

*United States Court of Appeals
for the Second Circuit*



**APPELLEE'S BRIEF
AND
APPENDIX**

74-2326

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

-X

In the Matters of D. H. OVERMYER CO., INC. :
(incorporated under the laws of Florida),
et ano., :
D

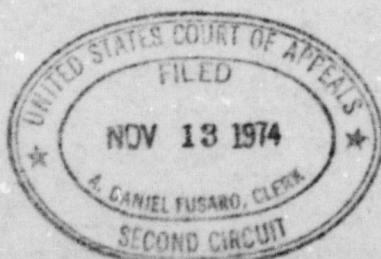
Debtors, : In Proceedings for
SAMUEL H. POKRASS and SYLVIA POKRASS, : Arrangements Nos.
73 B 1134 and
73 B 1129.
Plaintiffs-Appellees, :
-against- :
D. H. OVERMYER CO., INC., etc., et al., :
Defendants-Appellants. :
-X

In the Matters of D. H. OVERMYER CO., INC. :
(incorporated under the laws of
Massachusetts), et ano., :
D

Debtors, : In Proceedings for
GEORGE SAGAN and HAROLD KAPLAN, : Arrangements Nos.
73 B 1143 and
73 B 1129.
Plaintiffs-Appellees, :
-against- :
D. H. OVERMYER CO., INC., etc., et al., :
Defendants-Appellants. :
-X

On Appeals From the United States District Court
For the Southern District of New York

JOINT BRIEF AND APPENDIX OF PLAINTIFFS-
APPELLEES SAMUEL H. POKRASS AND SYLVIA
POKRASS AND GEORGE SAGAN AND HAROLD KAPLAN.



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JOINT BRIEF OF PLAINTIFFS-APPELLEES
SAMUEL H. POKRASS AND SYLVIA POKRASS
AND GEORGE SAGAN AND HAROLD KAPLAN.

Statement of Issue Presented

Did the District Court err in holding that the Bankruptcy Judge did not abuse his discretion in refusing to enforce the termination of the leases by the plaintiffs-landlords where the record showed a complete absence of compelling equitable or policy considerations which would justify non-enforcement and further showed a history of repeated willful defaults over many months and years in the payment of rent and taxes and the fulfillment of the other obligations of the debtors under the leases?

Statement of the Case

The Receiver of D. H. Overmyer Co., Inc. (Florida) and D. H. Overmyer Co., Inc. (Massachusetts), debtors in the within Chapter XI proceedings, and the debtors themselves appeal from the order of the United States District Court, Southern District of New York (Hon. Henry J. Werker), entered on October 4, 1974 (A-7-25)*, which order affirmed the orders and judgments

* References bearing the prefix letter "A" are to the Appellants' Appendix, as supplemented by the Appendix of the instant Appellees. In numbering the pages of their Appendix, appellants have chosen to designate the transcript pages of each trial below with a different letter. Thus, the transcript of the trial involving the property known as Boston ## 6 and 7 is numbered "A1" through "A88" in Appellants' Appendix and that part of the transcript contained in Appellants' Appendix with respect to the Miami # 2 trial is numbered "J1" through "J88a". The Appendix of the instant appellees contains the remainder of the Miami # 2 transcript and certain exhibits and orders entered in both the Boston ## 6 and 7 and Miami # 2 actions. For convenience sake, appellees have continued the numbering system used by appellants. Thus, that part of the instant Appellees' Appendix dealing with Boston ## 6 and 7 starts at page "A89" (thus cited "A-A89") and that part dealing with Miami # 2 starts on page "J89" (thus cited "A-J89").

of the Hon. Roy Babitt, Bankruptcy Judge, made on August 6, 1974 (A-A89-90; A-J100-01) ordering the termination of the leases between the debtors as tenants and the appellees as landlords with respect to the warehouse properties referred to in these proceedings as Boston ## 6 and 7 and Miami # 2 and requiring appellants to surrender possession of the leased premises to appellees.

These appeals are being heard together with other appeals by the Receiver and the various Overmyer debtors with respect to properties of other landlords which were the subject of the opinion of the Bankruptcy Judge dated July 23, 1974 (A-26-55) and of the District Court dated September 27, 1974 (A-7-25). In order to avoid duplication, the appellees represented by the undersigned are filing this joint brief pursuant to Rule 28(i) of the Federal Rules of Appellate Procedure.

The order of this Court dated October 15, 1974, which denied a stay of the judgment and order below, also granted an accelerated appeal based upon the briefs before the District Court, which briefs were to be supplemented by typewritten briefs to this Court, which the parties agreed would be limited to the opinion of the District Court and any errors claimed by the appellants to have

been committed therein. Annexed hereto (immediately preceding Appellees' Appendix) are the briefs submitted to the District Court on behalf of Samuel H. and Sylvia Pokrass, landlords of Miami # 2 (hereinafter "Miami Brief") and George Sagan and Harold Kaplan, landlords of Boston ## 6 and 7* (hereinafter "Boston Brief"), to which this Court is respectfully referred. Thus, the pertinent factual background in each of these appeals may be found at pp. 2-8 of the Miami Brief and pp. 2-7 of the Boston Brief; the prior proceedings herein up to the District Court's decision may be found at pp. 8-10 of the Miami Brief and pp. 8-9 of the Boston Brief; and the opinion of the Bankruptcy Judge is summarized at pp. 10-11 of the Miami Brief and pp. 9-10 of the Boston Brief.

Summary of Argument

In affirming the Bankruptcy Judge, the District Court -- after a review of the transcripts of all the cases on appeal (A-13 fn.) -- rejected each of the arguments raised by the Receiver and debtors (hereinafter collectively and separately referred to as "Overmyer"). Thus, insofar as the arguments which appellants continue to press in the instant appeals are

* Boston ## 6 and 7 consist of two adjoining 120,000 square foot warehouses (A-A57-58).

concerned, the District Court held that the Bankruptcy Judge did not abuse his discretion in refusing to exercise his equitable power to prevent the termination of the leases (A-24-25), finding that there was an absence of compelling equitable or policy considerations for preventing termination (A-14-17); that for a period of years prior to the filing of the Chapter XI petitions Overmyer's conduct with respect to many of the landlords formed a consistent pattern of failure to meet its lease obligations (A-15-16); that the proposed plan of arrangement was not feasible (A-18-19, 24-25), and that indeed, because of the nature of its business operations and its failure to meet its several obligations Overmyer simply cannot be rehabilitated (A-24-25); and that there was no evidence of any conduct on the part of the landlords which could in any way be described as unfair, overreaching or vexatious (A-16).

As will be demonstrated below, the conclusions of the District Court are fully applicable to Miami # 2 and Boston ## 6 and 7 and are fully sustained by the records in these actions.

Argument

POINT I

THE DISTRICT COURT WAS JUSTIFIED IN
CONSIDERING THE DEBTORS' CONDUCT AS
A FACTOR MILITATING AGAINST THE GRANT
OF EQUITABLE RELIEF FROM THE LEASE
TERMINATIONS.

Guided by this Court's opinion in Matter of Queens Boulevard Wine & Liquor Corp., ___ F.2d ___ (2d Cir. June 11, 1974), the Bankruptcy Judge determined that the only real issue in these cases was whether there existed "compelling equitable and policy considerations" which required the exercise of the Bankruptcy Court's discretionary equitable power to refuse enforcement of the otherwise enforceable termination clauses in the leases (A-45-46, 50-52). In concluding not to upset the lease terminations, the Bankruptcy Judge distinguished these cases from Queens Boulevard and held that no such compelling circumstances existed here (A-51-53; Miami Brief, pp. 10-11). As shown in the briefs before the District Court, such holding was amply supported by the record and could in no way be viewed as an abuse of discretion. Thus, the District Court was fully justified in affirming the Bankruptcy Judge on that ground alone.

The District Court went beyond the Bankruptcy Judge however, and found that an additional factor indicating denial of equitable relief was Overmyer's consistent pattern over the years of failing to meet its rent, repair, mortgage and tax obligations and its deceitful conduct immediately prior to the filing of the Chapter XI petitions in making promises to cure defaults which it knew could not be kept (A-15-17, 23-25).

While the District Court's opinion is clear that the debtors' conduct was merely a further ground indicating a lack of equity on the part of the debtors and compelling affirmance of the decision of the Bankruptcy Judge, the Receiver asserts that such findings were essential to the District Court's decision. The Receiver then proceeds to attempt to deny or minimize the inequitable nature of such conduct and its adverse impact upon the landlords (Receiver's Brief, pp. 45-50, 52-66, 71-72, 74, 76-77). As will be demonstrated below, none of the Receiver's contentions have merit.

A. Miami # 2.

Under the guise of attempting to justify the feasibility of the long since rejected plan of arrangement proposed by Overmyer (Receiver's Brief, p. 41), the Receiver attempts to show that the

facts with respect to the leases of the remaining properties of the debtor D. H. Overmyer Co., Inc. (Florida) do not support the District Court's conclusions as to Overmyer's inequitable conduct (Receiver's Brief, pp. 41-54). Unfortunately for the Receiver, an analysis of the facts with respect to the Miami # 2 lease demonstrates that Overmyer's conduct in connection therewith is a striking illustration of the correctness of the District Court's conclusions.

The uncontradicted record establishes that quite apart from the admitted events of default upon which the complaint herein is based (see Miami Brief, pp. 8-9), there was a consistent pattern on the part of Overmyer of defaulting upon its obligations under the lease, which conduct commenced long prior to the filing of the Chapter XI petition. Thus:

- (a) Overmyer was late in the payment of rent "At least four or five dozen times" going back to 1968 (A-J12-13, J54; J108-09), with the result that the Miami # 2 landlords had to resort to their own funds as a source of mortgage payments (A-J22-23);
- (b) Overmyer constantly failed to make real estate tax payments on time, with the result that the mortgagee of the premises threatened foreclosure (A-J15-17, J104);

- (c) By reason of Overmyer's failure to pay 1972 taxes, the Miami # 2 landlords were forced to use their own funds to pay such taxes (A-J16);
- (d) Overmyer made substantial alterations to the premises without even asking the Miami # 2 landlords for permission to make such alterations (A-J21)*;
- (e) Although required to do so under the lease, Overmyer never furnished the Miami # 2 landlords with copies of any of Overmyer's financial statements or of the subleases with respect to the premises (A-J18-20);
- (f) Overmyer, though required by the lease to maintain fire insurance in the amount of \$800,000, reduced the fire insurance on the premises to \$250,000, and landlords had to secure a new policy, at their own expense, in the amount of \$800,000 (A-J23-25, J42-43; J105-07)**;
- (g) By reason of Overmyer's defaults in the payment of taxes, the Miami # 2 landlords on at least two occasions were required to redeem the property from third persons to whom tax certificates had been sold (A-J16-17, J58);
- (h) The Miami # 2 landlords commenced an action in state court for eviction and termination of the lease as early as May 31, 1972 (A-J58). Based on Overmyer's promises of prompt payment of rent and taxes the Miami # 2 landlords did

* Ironically, the Receiver, by denominating such unauthorized alterations as "improvements" (Receiver's Brief, p. 49), seeks to create the false impression that these breaches of the leases were beneficial to the Miami # 2 landlords and should be ignored.

** The Receiver's disingenuous response to this pre-petition default is that after the commencement of the Chapter XI proceeding, the Receiver's own blanket policy covered the property in the amount called for by the lease (Receiver's Brief, p. 48). Moreover, even the Receiver's policy was inadequate, as it carried a \$250,000 deductible, whereas the lease permits only a \$5,000 deductible (A-J97).

not press the action but attempted to effectuate a settlement (A-J60). When Overmyer repeatedly defaulted in these payments, the Miami # 2 landlords voluntarily dismissed the first action and in February, 1973 instituted a second action in state court for eviction and termination, which action was pending at the time the Chapter XI petition was filed (A-J60-61);

- (i) It was conceded by Overmyer's counsel that there was what the Bankruptcy Judge characterized as "a chronic tardiness under the lease" (A-J64);
- (j) The \$42,042.02 in back rent and taxes paid by Overmyer into the state court which the Receiver proudly points to as evidence of Overmyer's diligence (Receiver's Brief, pp. 47, 74) amounted to five months arrears, was paid late and was the result of a court order requiring such payment as a condition of allowing Overmyer to remain in possession while the action was pending (A-J65); and
- (k) In July, 1973 and October, 1973 contempt motions were made in the state court action by reason of Overmyer's failure to comply with the state court's order requiring the timely payment of rent, which motions resulted in an order issued at around the time the Chapter XI petitions were filed requiring Overmyer to make October and November, 1973 payments and if not, to turn over to the court all rents to be received from subtenants, to be subject to withdrawal by the Miami # 2 landlords (A-J67-68, J115-16).

The willful nature of the foregoing defaults and Overmyer's total disregard of its obligations is well illustrated by Overmyer's response to the Miami # 2 landlords' complaint on March 30, 1973 that as of that date they had not received payments for five months (A-J112-14). In a letter dated April 3, 1973 Overmyer's Executive Vice President cavalierly replied that because landlords had commenced an action against Overmyer, "I have recommended to Management [that] they do not make any further payment of rent to Mr. Pokrass until such time as they are ordered to do so by the Court." (A-J110-11). Overmyer's total irresponsibility and contempt for its obligations is further underscored by the fact that, apparently at the same time that landlords were paying taxes and insurance premiums out of their own pocket and were being denied their monthly rental of \$5,968.67, Overmyer was receiving monthly rentals of \$14,637.22 from its subtenants (A-J102-03).

It is manifest from the foregoing that what the Receiver denigrates as "generalized" findings by the District Court with respect to Overmyer's inequitable conduct (Receiver's Brief, pp. 53-54) are overwhelmingly supported in every particular by the evidence in the Miami # 2 trial.

The Receiver makes a number of other contentions with respect to Miami # 2, all of which are either erroneous or irrelevant. Thus, the Receiver (Brief, pp. 46-47) seeks to imply that the termination at issue here is based upon the Florida Delinquent Tenant Act (e.g., Fla. Stat. Ann. §§ 83.05 and 83.20). The Receiver misstates the Miami # 2 plaintiffs' position. As can be seen from the Miami Brief, the Florida Delinquent Tenant Act was merely cited as a possible avenue of termination in the absence of a termination clause in the lease. Of course, in the present case, it is undisputed that the lease was properly terminated pursuant to a termination clause in the lease. See Miami Brief, pp. 5-6, 21-22.

The Receiver also argues that in a Florida eviction proceeding, the Florida courts will invoke their equity powers to relieve against a forfeiture, citing Rader v. Prather, 130 So. 15 (Fla. Sup. Ct. 1930). This argument begs the question of whether those equity powers would ever be exercised under the circumstances present here and, in any event, misconstrues Rader v. Prather. Thus, that case is limited by its terms to rental defaults (130 So. at 17), was based upon waiver (Ibid.) and merely states in passing that "it is generally held that equity will relieve against the forfeiture of a lease for the nonpayment

of rent whenever it is just and equitable to do so * * *.
(Ibid.) (emphasis supplied).*

The Receiver asserts (Receiver's Brief, pp. 47-48) that at the time the Chapter XI petition was filed, the rent arrears were only \$8,952 and that full tender of arrears was made by the debtor in its proposed plan of arrangement. Such assertions are erroneous and misleading. Thus, the rental of \$5,968.67 due on the first of each month (25D)** was not paid for October and November, 1973 (A-J9-10). Consequently, pre-petition rental defaults amounted to \$11,937.34 without regard to interest on late rental payments and unpaid taxes. The proposal to pay all arrears in a plan of arrangement cannot be regarded as a tender, and, as shown in Miami Brief, pp. 30-31, must be viewed as nothing more than an unenforceable hope at this time.

The Receiver also seeks to turn to his advantage the Miami landlords' unwillingness to accept a tender of arrears, claiming that the primary reason for such refusal was a supposed

* The Receiver's claim (Receiver's Brief, p. 48) that Florida courts hold that a tender of arrears is sufficient to prevent a forfeiture is false. Mayflower Associates, Inc. v. Elliott, 81 So.2d 719 (Fla. Sup. Ct. 1955), cited by the Receiver, merely states that such tender is a condition precedent to relief against forfeiture. As can be seen from Rader v. Prather, supra, 130 So. at 17, before relief will be granted by the Florida courts, there must be a finding that it would be just and equitable to grant such relief.

** The reference is to the designation in the Record on Appeal of the Miami # 2 lease.

desire to "appropriate the profits of the Miami 2 leasehold" (Receiver's Brief, p. 48). If the Receiver had continued his quotation from the transcript, the true reasons for such refusal would be revealed. Thus, one of the Miami # 2 landlords, Mr. Pokrass, a gentleman 81 years of age (A-J64), testified on cross-examination:

Q. * * * If the rents were paid up that are in arrears, would you like to continue in your landlord-tenant relationship?

A. Hell, no.

Q. Would you tell me why?

A. Because I can't be badgered anymore; I can't be bothered anymore. I got one heart attack on account of this. I am going to get surely a second one if I keep dealing with D. H. Overmyer.

* * *

Q. So, it's your desire, then, to terminate your relationship with Overmyer, is that correct?

A. By all means, yes.

Q. Why?

A. Because, as I said, because they are the biggest bunch of liars I have ever come in contact with in sixty years of building.

(A-J48-50).

Finally, despite the massive evidence supporting the District Court's finding of a pattern of default over the years and inequitable conduct on the part of Overmyer, the Receiver makes the argument that by reason of the Miami # 2 landlords' acceptance of late payments, they have waived any right to assert that Overmyer's defaults and inequitable conduct should be considered in determining whether to grant equitable relief against the lease termination (Receiver's Brief, p. 49). That argument is misplaced, as it ignores the fact that landlords are not relying on such defaults or inequitable conduct as the basis for termination, but rather, are merely asserting that such defaults and conduct should be considered when weighing the equities sought to be invoked by Overmyer. See pp. 18-20, infra. No authority or sound reason exists for the proposition advanced by the Receiver. The authorities cited at page 49 of the Receiver's Brief do not deal with any claim of waiver of conduct which would bar equitable relief against lease termination and are completely inapplicable.

B. Boston ## 6 and 7.

Unlike his efforts with respect to the Miami # 2 action, the Receiver does not attempt to analyze the record of the trial of the Boston ## 6 and 7 action. Like the Miami # 2 record, the

Boston ## 6 and 7 record fully supports the findings of the District Court that commencing long prior to the filing of the Chapter XI petition, there was a consistent pattern on the part of Overmyer of defaulting upon its lease obligations and that shortly prior to filing of the petition Overmyer engaged in deceitful conduct toward the Boston ## 6 and 7 landlords.

Thus, quite apart from the defaults relied upon as the basis for termination (see Boston Brief, p. 8), the uncontradicted testimony on landlords' case established that:

- (a) Overmyer was always months late in the payment of rent and in 1973 averaged "three months late all of the time" (A-All)*; with the result that the Boston ## 6 and 7 landlords had to resort to their own funds as a source of mortgage payments;
- (b) Overmyer constantly failed to make real estate tax payments on time, with the result that the mortgagee of the premises threatened foreclosure (A-All, A42-43; A92-93);
- (c) By reason of Overmyer's failure to pay taxes for October and November, 1973, the Boston ## 6 and 7 landlords were forced to use their own funds to pay such taxes (A-A17-18);

* This, despite the fact that the lease is claimed to be very profitable for Overmyer. See Schedule A to Receiver's Brief, following p. 82.

- (d) Overmyer's failure to fulfill its obligation to maintain and repair the premises has left the premises in a state of serious disrepair, with major repairs -- estimated by the Boston ## 6 and 7 landlords to cost approximately \$93,000 -- necessary for the roof, outside walls, inside floors and parking lot (A-A18-21);
- (e) Although required to do so under the lease, Overmyer never furnished the Boston ## 6 and 7 landlords with copies of any of the subleases with respect to the premises (A-A15); and
- (f) Overmyer purported to pay the rent for November, 1973 with a check which was returned for insufficient funds, of which fact Overmyer could not have been unaware (A-A8-10; A91).*

Thus, the evidence with respect to Boston ## 6 and 7 indisputably justified the District Court in finding that Overmyer engaged in a course of conduct and pattern of default and deceit in its dealings with the Boston ## 6 and 7 landlords.

In view of such conduct by Overmyer and the expense and inconvenience caused to the Boston ## 6 and 7 landlords thereby, landlords indicated that even if Overmyer were to

* This incident gives the lie to the Receiver's assertion in his Brief (p. 56) that the Denver # 1 incident is the "sole authority" for the District Court's finding (A-15) that just prior to filing the Chapter XI petition Overmyer made promises to cure defaults with "an intention to deceive". It is anticipated that counsel for other appellees will bring similar incidents to the attention of this Court.

cure all of its defaults* and affirm the lease, landlords would be unwilling to continue the relationship (A-A21).

C. The District Court Properly Considered
Overmyer's Conduct in Denying Equitable Relief.

In Point III of the Receiver's Brief, the Receiver argues that the District Court should not have denied equitable relief on the basis of Overmyer's conduct, to wit, Overmyer's consistent pattern over the years in defaulting under its lease obligations and its deceitful conduct toward the landlords during the days preceding the filing of the Chapter XI petition. In so arguing, the Receiver misstates the District Court's holding, since it is clear from the District Court's opinion that the debtor's conduct was just one of many factors which militated against the denial of equitable relief.

The Receiver makes the further argument that it was improper for the District Court to even consider Overmyer's pattern of defaults in determining whether or not to grant equitable relief (Receiver's Brief, pp. 58-66). The Receiver's thesis seems to be that if certain defaults do not in and of themselves justify

* The aggregate amount required to cure existing arrears and defaults in rent, taxes, repairs and maintenance alone under the Boston ## 6 and 7 lease is estimated to be approximately \$142,000, without regard to any additional sums which may have accrued for interest charges, penalties, late charges, attorneys' fees and other charges required to be paid to taxing authorities, mortgagees and to landlords themselves (A-A8, A10, A20-21).

eviction under certain circumstances, then a consistent pattern of such defaults should not even be considered when the defaulting party seeks extraordinary equitable relief against lease termination. This contention is not only patently erroneous, but in advancing it, the Receiver again misstates the District Court's conclusion. Thus, the District Court did not conclude that, in the words of the Receiver (Receiver's Brief, p. 62) "the pre-petition defaults represent such inequitable conduct as to bar relief from forfeiture". Rather, the District Court concluded that Overmyer's pattern of conduct over the years of defaults and broken promises was one of a number of factors which indicated that extraordinary equitable relief was not justified (A-15-19, 23-25). This conclusion was eminently correct.

defaults and its deceitful conduct into consideration, the District Court was doing nothing more than applying the basic maxim of equity jurisprudence that "he who seeks equity must do equity and must have clean hands". This maxim was applied by this Court in denying relief against lease forfeiture in United States v. Forness, 125 F.2d 928 (2d Cir.), cert. denied, 316 U.S. 694 (1942). As stated therein by Judge Frank, in remarks equally applicable to the present cases:

[I]t is equally well established that * * * such relief [against forfeiture] will be granted only to an innocent suitor, i.e., one with clean hands. This requirement bars relief to one who has been negligent -- or at least grossly so -- or who has inexcusably or deliberately gone into default. [Citations.] We think the defendants fall in the category of persons whose own conduct makes relief inequitable. [Citations.] There is not here a mere technical delay caused by an oversight; defendants, on the other hand, cavalierly ignored their modest obligation for * * * years.

125 F.2d at 940.

The "clean hands" doctrine is, of course, applicable to bankruptcy proceedings. See, e.g., Bolling v. Bowen, 118 F.2d 59, 62 (4th Cir. 1941); In re Beam, 163 F.Supp. 333, 335 (N.D. Ala. 1958).

The applicability of the "clean hands" doctrine was expressly recognized by the Bankruptcy Judge at the time he admitted into the record the evidence of Overmyer's patterns of default and inequitable conduct. See, e.g., A-J19-21; A-H28-29. Thus, the suggestion sought to be made at page 61 of the Receiver's Brief that the Bankruptcy Judge was unconcerned with "comparative equities" is false.

The Receiver seeks to minimize the significance and impact of Overmyer's pattern of defaults by arguing that the only "impediment" caused to the landlords thereby can be relieved by payment. The argument is invalid, as it ignores, among other things*, the expense, inconvenience and aggravation caused to the landlords by Overmyer's continuous defaults. Thus, as testified to by one of the landlords of Boston ## 6 and 7 (A-A21):

Q. If Overmyer was prepared today to reinstate all its defaults and wanted to affirm the lease, would you consider continuing your relationship with them if you have a choice?

A. I would rather not.

Q. Why not?

A. Only because of the difficulties of collecting my rent and seeing that the taxes are paid, and continual losses -- lawsuits -- hiring lawyers to collect the rent is not my idea of wanting to own property that way. I would rather not have them as a tenant.

See also A-J48-50.

* E.g., the necessity of the landlords to resort to their own funds to make mortgage and tax payments. See A-J16, J22-23; A-A16-18.

Similarly, the Receiver's lame excuse that Overmyer's repeated defaults should be ignored since they "are the very stuff of bankruptcy" and that "[s]uch a pattern of conduct is common when a debtor is approaching insolvency" (Receiver's Brief, p. 61) is belied by the finding of the District Court that such inequitable pattern of conduct existed "for a period of years prior to [Overmyer's] filing under the Barkruptcy Act" (A-A15).

In sum, the District Court was fully justified in considering Overmyer's long-standing pattern of defaults and inequitable conduct as one of the factors which militated against equitable relief from the lease terminations.

POINT II

THE COURTS BELOW PROPERLY TOOK INTO
CONSIDERATION THE ABSENCE OF ANY SHOW-
ING THAT OVERMYER HAS A REASONABLE
PROSPECT OF BEING REHABILITATED.

One of the factors considered by the courts below in their denial of relief against the lease terminations was the absence of a showing by the Receiver or debtors of any reasonable prospect that Overmyer could be rehabilitated (A-A17-19, A24-25, A53-54). This should be contrasted with the Queens Boulevard case, supra, wherein one of the key factors relied upon by this Court

was that a plan of arrangement had been accepted by creditors and was on the verge of consummation.

The appellants seek to bring this case within the umbrella of Queens Boulevard by asserting that the plan of arrangement proposed in January, 1974 is feasible and that the courts below erred in determining that there was no showing that the proposed plan could be financed or would ever be accepted by creditors. (See Receiver's Brief, pp. 38-41, Debtors' Brief, pp. 8-11.) The appellants' "feasibility" argument has already been demonstrated to be erroneous in the briefs before the District Court. See, e.g., Boston Brief, pp. 29-31. Only a few additional comments are necessary here.

The simple answer to appellants' argument is that quite apart from any questions as to the plan's feasibility, the Bankruptcy Act (§ 362[1]) requires that the plan be accepted by a majority of creditors in each class, both in number and amount. It is only then that the court is required to consider, among other things, the plan's feasibility. See Bankruptcy Act, § 366. In the present case, Overmyer has been unable to obtain anywhere near the requisite acceptances from any class of creditors, let alone the landlords involved in these appeals, despite the fact that the plan has been outstanding since January 7, 1974 (A-56-58).

Moreover, even appellants' attempts to show feasibility in their briefs are insufficient and misleading. Thus, appellants (Receiver's Brief, p. 40; Debtors' Brief, p. 9) argue that the aggregate arrearages owed to the landlords on this appeal is only \$418,000, payment of which may be financed either out of the profits of the leaseholds involved or by mortgaging such leaseholds. In the first place, appellants' contentions continue to reveal nothing more than conjecture with respect to funding the plan. The proposed plan, as must any plan, provides for full payment of all arrears on ongoing leases at confirmation (A-57). The supposed profits from such properties, to be generated subsequent to confirmation, could not provide the source for such payments. As for mortgage financing, no commitment of any kind has been forthcoming from any source.

Next, the \$418,000 figure is misleading in a number of respects: (a) it is confined to rental defaults and does not include the vast amounts which will be required to bring up to date Overmyer's other obligations under the leases, such as repairs, past due taxes, late charges, interest charges and attorneys' fees; (b) it ignores the amounts which the Receiver still owes for unpaid use and occupation rental payments accruing in these Chapter XI proceedings; and (c) the \$418,000 figure was arrived at by eliminating the arrears with respect to the 8 properties which were subject

to the decision of the Bankruptcy Court, but which are not the subject of appeals (see Receiver's Brief, p. 5).

Further, quite apart from the fact that the proposed plan calls for a patently unrealistic and unacceptable 100% payment in bi-monthly payments of 1% (i.e., 16 years, 8 months) to Class 2 creditors (consisting for the most part of landlords whose leases have been rejected [A-57]), it is apparent that this aspect of the plan is unfeasible as well. Even on appellants' own figures the amounts owed to the Class 2 creditors equals at least \$11,500,000 (Debtors' Brief, p. 10). Assuming, arguendo, that the \$520,000 annual profit with respect to the leases on appeal claimed by appellants (e.g., Receiver's Brief, p. 40) does not diminish in the future, it would take over 22 years for Overmyer to meet the payments to Class 2 creditors out of such profits. To put it another way, in order merely to meet the Class 2 payments within the time prescribed in the plan, Overmyer would have to generate from other sources additional profits of approximately \$170,000 per year. There is nothing in the record to indicate how Overmyer would generate such profit.

The courts below were thus fully warranted in finding that Overmyer's "plan" is unfeasible and that Overmyer is beyond rehabilitation.

POINT III

THE FINDINGS OF THE COURTS BELOW
WERE NOT CLEARLY ERRONEOUS IN
ANY MATERIAL RESPECT.

The appellants attempt to argue that the decisions below were based upon erroneous findings of fact (Receiver's Brief, pp. 67-77, Debtors' Brief, pp. 4-7). The Receiver recognizes that in order to upset any of such findings, the challenged finding must be found to be "clearly erroneous" (Receiver's Brief, p. 67). See, e.g., Rules of Bankruptcy Procedure, Rules 752 and 810, Federal Rules of Civil Procedure, Rule 52. As will be shown below, none of the challenged findings are erroneous in any material respect, much less "clearly" erroneous.

A. The Landlords as Majority Creditors.

The Receiver in his Brief (pp. 67-68) takes issue with a supposed finding that the landlords involved in these appeals represent the majority of creditors and alleges that the conclusion of the courts below that the plan is unfeasible is based upon such finding. The Receiver is in error. In the first place, there is nothing in the excerpts from the opinions below quoted by the Receiver in his Brief which indicates that the courts below were referring only to the landlords involved in these appeals, rather than all of the landlord-creditors, including those landlords whose leases have been rejected. The "landlord-purchasers" (A-34) include all of the landlord creditors and it is not and cannot be

disputed that they constitute the vast majority of Overmyer's creditors. Second, as shown above, the Receiver's \$418,000 figure for the amount of arrears owing to the landlords involved in these appeals is misleading, as it ignores non-rental arrears and fails to include amounts owing to landlords of properties which were included in the decisions below, but as to which no appeals have been pursued. Finally, the Receiver confuses the feasibility of the plan with its acceptance by creditors. Thus, whether or not the landlords involved in these appeals represent a majority of creditors, the basis for the findings of the courts below that the plan is unfeasible is the lack of any evidence that the plan can realistically be funded (A-19, 53). See also pp. 23-24, supra. Moreover, insofar as acceptability to creditors is concerned, there is no evidence that the plan is acceptable to or has been accepted by a majority of creditors of any class, including those creditors other than the landlords involved in these appeals who comprise Class 2 under the proposed plan. See p. 22, supra. Thus, the Receiver's objection is immaterial as well as erroneous.

B. Value And "Windfall".

Appellants also challenge the District Court's finding (A-17) that the alleged "windfall" to the landlords which appellants claim will be the result of the lease terminations was "largely

illusory" (Receiver's Brief, pp. 68-70, Debtors' Brief, pp. 4-7). In support of such claim, the Receiver merely reiterates what is not disputed, to wit, that the properties which are involved upon these appeals currently show an operating profit and that the leases have a certain undetermined value. The "windfall" contention has been fully answered in the briefs before the District Court wherein it is demonstrated that there is no evidence in the record as to the existence or the amount of any "windfall" (see, e.g., Boston Brief, pp. 35-36) and in the District Court's opinion (A-17-18 fn.).*

In any event, even assuming, arguendo, that as a result of termination there might ultimately be a profit for the landlords, the only alternative thereto is the continuation of Overmyer as a tenant and the likelihood of continued inconvenience,

* The only error made by the District Court on the "windfall" issue is its erroneous statement that both the Receiver and debtors annexed charts to their briefs below showing projected profitability, when in fact it was only the debtors' brief which contained such projections. These projections, in a chart entitled "Projected Gross Profit Over Life of Lease and Renewal Option", showed supposed values in the millions, but were based upon suppositions which had no evidentiary support. See, e.g., Boston Brief, pp. 35-36. The Receiver seizes upon this insignificant error to attempt to create the false impression that no such projections of profitability existed in either brief (Receiver's Brief, p. 69). Even though this appeal is to be based upon the briefs before the District Court, the debtors have evidently failed to submit their brief below to this Court.

expense and aggravation for the landlords arising from Overmyer's defaults and the consequent threats of foreclosure by unpaid mortgagees and tax sales by unpaid governmental authorities. The termination clauses are enforceable contractual provisions for the protection of the landlords which will have the effect of preventing further losses and, as recognized by the Bankruptcy Judge (A-44, 54), if a "windfall" results from termination, it is a "windfall" for which the landlords have bargained and which could have been anticipated by Overmyer when it saw fit to include the termination clauses in its standard form of lease.

C. The Debtors' Conduct.

The findings of the District Court with respect to the debtors' conduct, both in general and with particular application to the Boston ## 6 and 7 and Miami # 2 properties, have been fully discussed above, pp. 5-21, supra, and have been shown to be correct and overwhelmingly supported by the record. No further discussion is necessary here.

POINT IV

THERE WAS NO NEED FOR THE BANKRUPTCY JUDGE TO MAKE SPECIFIC FINDINGS OF FACT WITH RESPECT TO EACH CASE.

The Receiver's contention in Point V of his Brief that the District Court erred in concluding that there was no need for the Bankruptcy Judge to make separate and specific findings of fact for each of the 24 cases tried before him has been shown in the briefs below to be totally without merit. See, e.g., Boston Brief, pp. 32-34. As shown therein, all applicable requirements as to findings were met by the Bankruptcy Judge by his specifically listing in his opinion (A-45-53) the various equities and criteria mentioned in the cases such as Queens Boulevard in which termination was refused, and then specifically finding that not enough of such factors existed in any of the present cases to justify the application of his discretionary equitable power to upset the lease terminations. Moreover, any hypothetical defect in the Bankruptcy Judge's opinion was cured by the District Court, which read the transcript of each trial below (A-13), discussed each of the contentions raised by appellants and specifically rejected all such contentions (A-13-24).

Conclusion

The order of the District Court must be affirmed
in all respects.

Respectfully submitted,

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Allen P. Rosiny
Of Counsel.

November 11, 1974.

BRIEFS BEFORE DISTRICT COURT

OFFICE COPY

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----- x
In the Matters of D. H. OVERMYER CO., :
INC. (incorporated under the laws of
Massachusetts), et ano., :
----- x

Debtors, : In Proceedings for
GEORGE SAGAN and HAROLD KAPLAN, : Arrangements Nos.
Plaintiffs-Respondents, : 73 B 1143 and
-against- : 73 B 1129
D. H. OVERMYER CO., INC., etc., et al., :
Defendants-Appellants. :
----- x

MEMORANDUM OF PLAINTIFFS-
RESPONDENTS GEORGE SAGAN
AND HAROLD KAPLAN

Theodore Gewertz
Allen P. Rosiny
Of Counsel.

WACHTELL, LIPTON, ROSEN & KATZ
299 PARK AVENUE • NEW YORK, N.Y. 10017
Attorneys for Plaintiffs-Respondents

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----- x

In the Matters of D. H. OVERMYER CO., :
INC. (incorporated under the laws of
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Debtors, : In Proceedings for
GEORGE SAGAN and HAROLD KAPLAN, : Arrangements Nos.
73 B 1143 and
73 B 1129

Plaintiffs-Respondents, :

-against- :

D. H. OVERMYER CO., INC., etc., et al., :

Defendants-Appellants. :

----- x

MEMORANDUM OF PLAINTIFFS-
RESPONDENTS GEORGE SAGAN
AND HAROLD KAPLAN

Statement

This memorandum is submitted on behalf of plaintiffs-
respondents George Sagan and Harold Kaplan, landlords of certain
warehouse premises referred to on the debtors' books and records
as Boston 6 and 7 (the "Premises") in opposition to the appeal of
the Receiver and debtors from the order and judgment of the
Honorable Roy Babitt, Bankruptcy Judge, dated August 6, 1974
which, pursuant to a written opinion dated July 23, 1974, de-
clared the lease (the "Lease") between plaintiffs and the debtor

D. H. Overmyer Co., Inc. (Massachusetts) (hereinafter "Overmyer") terminated and directed that the Receiver and Overmyer surrender possession of the Premises to plaintiffs.

Statement of Facts

The facts with respect to this action and the other actions encompassed within the July 23, 1974 opinion of the Bankruptcy Judge are basically similar. Briefly, in each instance each group of landlord plaintiffs purchased from the respective debtors* real property consisting of land and warehouse facilities. Concurrently therewith the landlord plaintiffs leased the premises back to the debtors pursuant to written long term "net leases" whereby the debtors, in addition to their fixed monthly rental obligation, were required to make all cash expenditures with respect to the premises (including insurance, taxes, and expenditures for repairs), except for interest and amortization on the respective fee mortgages. The debtors either directly or indirectly through an affiliated corporation sublet the premises to users of the warehouse space, usually on a short term basis (see Opinion, pp. 6-7).

* When used hereinafter the term "debtors" will refer to the Overmyer organization as a whole, including the separate Overmyer companies in each state which held title to the warehouses involved in the actions which are the subject of the July 23, 1974 opinion and this appeal.

Prior to the filing of the petitions for arrangements, the debtors' business collectively consisted of the rental of warehouse space to subtenants at some 200 to 250 sites leased by the debtors and the operation of public warehousing facilities at certain of those sites. Shortly after the commencement of these arrangement proceedings, the public warehousing operations were discontinued (Opinion, p. 6). It would appear that since the inception of these proceedings on November 16, 1973, the debtors have rejected leases at approximately 200 sites and have returned possession of such premises to the respective owners thereof, leaving the debtors with about 40 sites, approximately 20 of which are involved in these appeals (see Opinion, p. 7).

The Lease in the present action (Applicant's Exhibit 1) provides for a net monthly rental of \$16,380. (The Premises consist of two 120,000 square foot warehouses in Framingham, Massachusetts and the land upon which they are built.) The testimony upon trial showed that the Receiver was earning approximately \$9,091 per month from the property, before insurance, maintenance, home office expenses, administrative expense, brokerage expense and the like (Tr. 57).* At the minimum, such expenses amount to \$40,000 per year (\$3,333 per month) for a 240,000 square foot property such as Boston 6 and 7 (Transcript of April 18, 1974,

* All references in this memorandum prefaced by "Tr." are to the pages of the transcript of the trial of the action.

pp. 88-90; Tr. 57-58). After giving effect to such expenses, the profit to the Receiver is \$6,591 per month. Such amount should be diminished by giving effect to Overmyer's obligation to make extraordinary repairs estimated to cost approximately \$93,000 (Tr. 18-21), see pp. 6-7, infra.

Section 15.01(b) of the Lease provides, inter alia, that it shall be an event of default "if Tenant shall file for reorganization or for an arrangement pursuant to the Bankruptcy Act of the United States * * *." Other events of default include the failure to pay rent within a specified time (15 days) after notice that payment is due -- §15.01(a), and the appointment, in a proceeding brought by the Tenant, of a receiver or trustee of all or a substantial part of the Tenant's property -- §15(c).

The undisputed proof upon trial established the existence of numerous events of default entitling plaintiffs to terminate the Lease. Thus, pursuant to Section 15.01(b) of the Lease (Applicant's Exhibit 1), the filing of the petition for an arrangement herein on November 16, 1973 pursuant to the Bankruptcy Act was an event of

default. Likewise, pursuant to Section 15.01(c) of the Lease, the appointment of Mr. Herzog as Receiver (and for a short time as Trustee) was also an event of default. Furthermore, the failure of Overmyer to pay the rental installments in the amount of \$16,638.34 each due on October 1, 1973 and November 1, 1973 within 15 days after having been given notice that such payments were due (such notice having been given through a letter dated December 4, 1973 to Mr. Herzog, who was then Trustee and to his attorneys [Applicant's Exhibit 3] and also by the service upon Overmyer and Mr. Herzog on December 3, 1973 of the complaint in this action) constituted yet another default. Other defaults included the breach by Overmyer of its obligation under the Lease (§§3.05 and 4.01) to pay as additional rent taxes for the months of October and November, 1973 in the amount of \$7,138 for each month and interest charges on unpaid rental installments (Lease, §3.05).

Section 15.02 of the Lease provides for its termination by service by the landlord of a written notice of election to terminate upon a specified date not less than 10 days after the mailing of such notice, the Lease to terminate on the date specified in the notice. In the present case, it is undisputed that such a notice, calling for the termination of

the Lease on December 15, 1973 was mailed by plaintiffs' attorneys on December 4, 1973 (see Applicant's Exhibit 3; Tr. pp. 7-8).

Quite apart from the events of default upon which the complaint herein is predicated, the proof upon trial showed that there was a consistent pattern on the part of Overmyer of defaulting upon its obligations under the Lease, which conduct commenced long prior to the filing of the arrangement petition herein. Thus, the uncontradicted testimony on plaintiffs' case established that:

- (a) Overmyer was always months late in the payment of rent and in 1973 averaged "three months late all of the time" (Tr. 11);* with the result that plaintiffs had to resort to their own funds as a source of mortgage payments;
- (b) Overmyer constantly failed to make real estate tax payments on time, with the result that the mortgagee of the premises threatened foreclosure (Tr. 11, 42-43; Applicant's Exhibit 5);
- (c) By reason of Overmyer's failure to pay taxes for October and November, 1973, plaintiffs were forced to use their own funds to pay such taxes (Tr. 17-18);
- (d) Overmyer's failure to fulfill its obligation to maintain and repair the Premises has left the Premises in a state of serious disrepair, with major repairs -- estimated

* This, despite the fact that the Lease is claimed to be very profitable for Overmyer.

by plaintiffs to cost approximately \$93,000 -- necessary for the roof, outside walls, inside floors and parking lot (Tr. 18-21);

- (e) Although required to do so under the Lease, Overmyer never furnished plaintiffs with copies of any of the subleases with respect to the Premises (Tr. 15); and
- (f) Overmyer purported to pay the rent for November, 1973 with a check which was returned for insufficient funds, of which fact Overmyer could not have been unaware (Tr. 10; Applicant's Exhibit 4).

In view of the constant pattern of default by Overmyer and the consequent expense and inconvenience caused to plaintiffs thereby, plaintiffs indicated that even if Overmyer were to cure all of its defaults and affirm the Lease, plaintiffs would be unwilling to continue the relationship (Tr. 21). Moreover, the aggregate amount required to cure existing arrears and defaults in rent, taxes, repairs and maintenance alone under the instant Lease is estimated to be approximately \$142,000, without regard to any additional sums which may have accrued for interest charges, penalties, late charges, attorneys' fees and other charges required to be paid to taxing authorities, mortgagees and to plaintiffs themselves. As found by the Bankruptcy Judge, the aggregate pre-petition arrearages under all of the debtors' leases is well in excess of \$12,000,000 (Opinion, p. 9) and as admitted by the debtors in their brief (p. 41), the aggregate amount of arrearages under the leases involved on these appeals is close to \$1,000,000.

Prior Proceedings

This adversary proceeding was commenced on December 3, 1973 with the service and filing of plaintiffs' complaint and the summons and notice of trial. The complaint alleged termination of the Lease not only by reason of the bankruptcy and receiver clauses thereof (Sections 15.01(b) and (c)), but also by reason of Overmyer's failure to make October and November, 1973 rent and tax escrow payments (Section 15.01(a)). Answers were served by Overmyer and the Receiver. The defenses asserted by each were: (1) that the court in its discretion could relieve against the termination of the Lease and the forfeiture of Overmyer's interest therein by reason of "technical default" under the "bankruptcy" clause in the Lease, on the ground that such termination and forfeiture would constitute a penalty and unjust enrichment to the landlord plaintiffs where all defaults would be cured in a duly confirmed plan of arrangement; (2) that the court should, in the exercise of its discretion, allow Overmyer to remain in possession pending negotiations between Overmyer and its creditors for a plan of arrangement; and (3) that the complaint was premature in that plaintiffs had allegedly not given the proper notice or notices of termination required under the Lease.

The action was tried on January 14, January 23 and April 18, 1974. By written opinion dated July 23, 1974, the Bankruptcy Judge decided that plaintiffs' termination of the Lease would be given effect and that plaintiffs were entitled to immediate possession of the Premises. An order and judgment thereon was entered on August 6, 1974. The appeal of Overmyer and the Receiver from that order and judgment followed.

The Opinion of the Bankruptcy Judge

The Bankruptcy Judge issued a blanket opinion covering the approximately 20 adversary actions commenced by the various landlord plaintiffs seeking to recover possession of their warehouse properties from the various debtors and the Receiver. In the Bankruptcy Judge's view, the only real issue was whether there existed "compelling equitable and policy considerations" which required the exercise of the court's discretionary equitable power to refuse enforcement of the otherwise enforceable termination clauses in the leases. See Matter of Queens Boulevard Wine & Liquor Corp., ___ F.2d ___ (2d Cir. June 11, 1974). The Bankruptcy Judge held that no such compelling considerations existed in the present cases. Thus, the Bankruptcy Judge observed that Overmyer is neither a company which serves the public at large, such as

the railroad in Smith v. Hoboken R. Co., 328 U.S. 113 (1946), nor a company with public shareholders or debtholders whose investments would be wiped out by a termination of the leases, such as the Chapter X debtors in In re Fleetwood, 335 F.2d 857 (3d Cir. 1964) and Weaver v. Hutson, 459 F.2d 741 (4th Cir. 1972). Further, the Bankruptcy Judge found, on the undisputed facts, that none of the equitable considerations present in the Queens Boulevard case, supra, were present in the instant cases. Thus, in contrast to the Queens Boulevard case, the Bankruptcy Judge found the defaults in the present cases to be "staggering" rather than merely a default in payment of one month's rent as in the Queens Boulevard case; the properties in question here are not the debtors' only warehouses; there was no tender of the arrearages and no such tender could be made "in light of the aggregate of the pre-petition debt due these landlords who make up the bulk of the debtor's creditors"; the termination clauses are clear and unambiguous and not subject to amelioration by the debtors; no conduct on the part of the landlords even suggests forbearance or waiver of defaults on their part; no feasible plan of arrangement has been accepted or offered; and it is doubtful whether any such plan of arrangement could ever be offered (Opinion, pp. 26-29). Under such circumstances, the Bankruptcy Judge concluded that "the termination clauses in issue are enforceable against the debtor, and on the facts here, and in the exercise of its equitable jurisdiction *** should be enforced." Opinion, p. 30.

POINT I

THE TERMINATION OF THE
LEASE BY PLAINTIFFS MUST
BE GIVEN EFFECT.

The Court of Appeals for this Second Circuit has consistently recognized that, absent some sort of waiver or estoppel, or compelling equitable and policy considerations, the fact that a corporation may be in an arrangement or reorganization proceeding does not deprive a landlord of his contractual right to terminate a lease upon the occurrence of an event of default therein. See, e.g., Model Dairy Co. v. Foltis-Fischer, Inc., 67 F.2d 704, 706 (2d Cir. 1933); In re Walker, 93 F.2d 281 (2d Cir. 1937); B.J.M. Realty Corp. v. Ruggieri, 326 F.2d 281, 282 (2d Cir. 1963); Davidson v. Shultz, 354 F.2d 946, 948 (2d Cir. 1966); In re Speare, 360 F.2d 882 at 877 (2d Cir. 1966); Matter of Queens Boulevard Wine & Liquor Corp., F.2d (2d Cir. June 11, 1974). As stated by the Court in the B.J.M. Realty Corp. case:

Though we are loath to subject re-organization proceedings to disruption by permitting forfeiture of a lease, the landlord's contractual right cannot be disregarded without clear evidence that he intended to abandon it.

326 F.2d at 284.
(Emphasis supplied.)

The enforceability of the landlord's right to terminate has long been recognized both by the Supreme Court (see Finn v. Meighan, 325 U.S. 300, 302 [1944] -- "an express covenant of forfeiture has long been held to be enforceable against the bankruptcy trustee.") and the Bankruptcy Act itself. See §70b, which provides in relevant part:

an express covenant that an assignment by operation of law or the bankruptcy of a specified party thereto or of either party shall terminate the lease or give the other party an election to terminate the same is enforceable.

See also 8 Collier, Bankruptcy §3.15[4] n. 16 (14th ed. 1971). And, in the present case, the Bankruptcy Judge specifically held that "[T]his case does not turn on resolution of the issue whether or not termination clauses such as those here, are enforceable in these Chapter XI proceedings" (Opinion, pp. 15-16).

As was recognized by the Bankruptcy Judge (Opinion, pp. 20-21), the dispositive issue in the present case is whether or not there exist "compelling equitable and policy considerations" requiring the bankruptcy court to exercise its equitable power, recognized by the Second Circuit in Matter of Queens Boulevard Wine & Liquor Corp., ___ F.2d ___ (2d Cir. June 11, 1974), to

refuse to enforce a lease termination provision. It is submitted that the Bankruptcy Judge was eminently correct in holding that the Queens Boulevard decision and rationale had no application to "the facts present here" in that "[t]he debtor here neither presents the appealing facts of Queens Boulevard nor any of 'the particular circumstances' there" (Opinion, p. 27).

Thus, in Queens Boulevard, the premises in question were the debtor's sole place of business; only one month's rent was in default at the time the Chapter XI petition was filed; there were not defaults in any of the other terms of the lease; the basis for termination was only the bankruptcy clause and not defaults in the payment of rent or taxes also; prior to the notice of termination the debtor offered to pay all the unpaid rent which the landlord indicated it would accept; the landlord did not attempt to terminate until after it had received an offer to lease the premises at a higher rent; upon the hearing before the Referee the debtor tendered a certified check for all rent then due, including rent for the period prior to the filing of the petition; the lease in question contained a clause negating termination by reason of the arrangement proceeding if timely payment of all rent was made; a plan of arrangement had been tentatively agreed to by the

debtor's creditors and the rehabilitation prospects for the debtor were excellent; payments for use and occupancy while the arrangement proceedings were pending were promptly made; and the landlord was fully secured by, but did not resort to, a sizeable security deposit. None of such factors or comparable factors exist in the present situation, and as noted, the Bankruptcy Judge so held. See Opinion, pp. 26-29.

The law is clear that upon this appeal, these findings of the Bankruptcy Judge may not be set aside unless clearly erroneous. See Rules 752 and 810 of the Rules of Bankruptcy Practice. Thus, Rule 810 provides:

Upon an appeal the district court may affirm, modify, or reverse a referee's judgment or order, or remand with instructions for further proceedings. The court shall accept the referee's findings of fact unless they are clearly erroneous, and shall give due regard to the opportunity of the referee to judge the credibility of the witness. (Emphasis supplied.)

See also 2A Collier, Bankruptcy §29.28 (14th ed. 1974) and cases cited therein.

Moreover, the essence of the defenses raised by Overmyer and the Receiver are admittedly and expressly directed to the

bankruptcy court's equitable "discretion" to relieve against forfeitures in certain limited circumstances. See Answers of Receiver and Debtor, §§ 10, 11 and 13. As shown, the Bankruptcy Judge, in his "discretion" declined to refuse to enforce the termination clause, finding an absence of any circumstances warranting non-enforcement. It is well established that the exercise of discretion by the Bankruptcy Judge on matters within his discretion will not be disturbed unless that discretion has been abused. As stated by the Second Circuit in Matter of Transvision, Inc., 217 F.2d 243, 246 (2d Cir. 1954), cert. denied, 348 U.S. 952 (1955):

[T]his determination * * * is one within the purview of the district court's discretionary exercise of its equity powers * * * and unless the petitioner's corporate and financial condition is demonstrably such as to indicate that the district court has abused that discretion, its determination should be sustained.

(Emphasis supplied.)

See also, Duggan v. Franklin Square Nat. Bank, 170 F.2d 922, 924 (2d Cir. 1948); Gold v. John R. Blair Co., 142 F.2d 144 (2d Cir. 1944); Goldstein v. Wolfson, 132 F.2d 624, 626 (2d Cir. 1943); Benitez v. Bank of Nova Scotia, 110 F.2d 169, 174 (1st Cir. 1940); Sampsell v. Norrell, 162 F.2d 4, 7 (9th Cir. 1947); In re McGoldrick, 121 F.2d 746, 750 (9th Cir.), cert. denied, 314 U.S. 675 (1941). —

In the present case, not only was there no abuse of discretion on the part of the Bankruptcy Judge in giving effect to the termination of the Lease, but it would have been an abuse of discretion not to enforce the termination. Thus, quite apart from the total lack of affirmative "compelling equitable and policy considerations" in favor of Overmyer, the proof adduced at trial shows that Overmyer has consistently been in willful default and has not acted in good faith toward the plaintiffs. As demonstrated, this is not a situation where there was simply an isolated failure to timely pay one or two rental installments; rather, it is the culmination of a history of repeated willful defaults over many months and years, not only in the timely payment of rent, but in the fulfillment of Overmyer's lease obligation to pay taxes, to maintain the Premises and make repairs, to maintain insurance, to keep the Premises free from liens, to provide information and furnish documentation to plaintiffs, and to fulfill Overmyer's other obligations under the Lease (see pp. 6-7, supra). And, the proof showed that as Overmyer's situation deteriorated, it had no hesitation to resorting to payment of its obligations with a check which it knew could not be honored (Tr. 10; Applicant's Exhibit 4). Thus, Overmyer has not acted responsibly in the past and there is no reason to believe it will act responsibly in the future. There is no equity whatsoever on its side.

Whatever equity exists in this situation belongs to plaintiffs. It is plaintiffs who have had to meet taxes and other obligations of Overmyer; it is plaintiffs who have had to resort to their own funds to meet mortgage payments which if not made would lead to the wiping out of not only plaintiffs' interest in the Premises, but Overmyer's lease interest as well; it is plaintiffs who have been required to worry about problems of repairs, maintenance, insurance, liens and the like. Thus, even if the Bankruptcy Judge had the discretionary equitable power to refuse to enforce the termination clause in the Lease, any such refusal in this case would have been an abuse of discretion in view of the total lack of equity on the part of Overmyer, much less the absence of any affirmative "compelling equitable and policy considerations" in Overmyer's favor.

Implicit in the Bankruptcy Judge's decision that no "compelling equitable and policy considerations" existed which justified refusal to give effect to the termination of the Lease, was the conclusion that the mere fact that the Lease is profitable to Overmyer, did not justify non-enforcement of such termination. Such conclusion was indisputably correct. See, e.g., Schokbeton Industries, Inc. v. Schokbeton Prods. Corp., 466 F.2d 171 (5th Cir. 1972), wherein the court refused to deny effect to termination of a licensing agreement claimed to be the debtor's "most valuable asset."

As stated therein:

We do not overlook the fact that in addition to providing a swift and economical method for facilitating simple compositions among relatively sophisticated unsecured creditors, a Chapter XI arrangement is even more vitally concerned with the ultimate rehabilitation of the debtor. Nor do we disregard the referee's findings of fact that the loss of the exclusive franchise will seriously jeopardize Debtor's competitive position and cause it irreparable injury. We conclude that this is simply not a case for the invocation of high equity.

466 F.2d at 177 (Emphasis supplied).

In addition to the Queens Boulevard case, Overmyer and the Receiver may also seek to rely upon the cases from other circuits whose reasoning the Queens Boulevard court found persuasive, namely Weaver v. Hutson, 459 F.2d 741 (4th Cir. 1972) and In re Fleetwood Motel Corp., 335 F.2d 857 (3d Cir. 1964). Neither case has any relevance here. As stated by the Bankruptcy Judge:

Weaver and Fleetwood both involved, in Chapter X proceedings, large public investment in those debtors and an expression of concern by the Securities and Exchange Commission that enforcement of the termination clauses would end the debtor's operation to the detriment of the public debt. While it is true that in Weaver the court declined to grant a "windfall" possession to the pressing landlord, the concern there was for the public investors who would be wiped out unless there was a res which the debtor could operate en route to successful reorganization.

The debtor here is not seeking reorganization under Chapter X. Indeed, in the absence of public debt or public holding of its stock, the appropriate vehicle is the Chapter XI statutory scheme, which it chose. SEC v. American Trailer Rental Co., 379 U.S. 594, 613-618 (1965). But while Chapter XI may have the laudable purpose of rehabilitating strapped debtors, it is no guarantee of continued existence to every plagued company. In re Webcor,

Inc., 392 F.2d 893 (7th Cir. 1968), cert. denied 393 U.S. 837 (1968) sub. nom. Silver, Inc. v. Webcor, Inc. It is certainly no guarantee that this court's broad power of injunction under the scheme of Chapter XI will be utilized to bar the landlords from their property under clear and plain speaking bargains made with debtors whose financial condition may have become precarious years later and where the landlords have been seriously impeded, a fact noted by Judge Brieant of this court in Matter of Unishops, Inc., unreported, 73 B 1208 (S.D.N.Y. March 4, 1974), affirmed without comment on this point, 494 F.2d 689 (2d Cir. 1974), and very much present here.

Opinion, pp. 23-24
(Emphasis supplied).

Moreover, in the Fleetwood and Weaver cases, the result of enforcement of the termination clauses would have been to turn over to the landlord costly motel buildings owned by the tenants which had been constructed on land owned by the landlords. By contrast, in the present situation, the warehouse buildings themselves, as well as the land, are owned by the landlords who are obligated to pay the mortgages thereon. As the proof upon trial demonstrated, the rental payments required to be made by Overmyer were the primary source for payment of the mortgages by plaintiffs; such payment and consequently the plaintiffs' ownership of the property was threatened by Overmyer's constant failure to make rental payments. (See Opinion, p. 11; Tr. 11, 42-43; Applicant's Exhibit 5.) Thus, enforcement of the termination provisions in the Lease is necessary to prevent jeopardy to the plaintiffs' financial interest, a factor expressly found to be absent in the Weaver and Queens Boulevard cases.

In sum, the Bankruptcy Judge's enforcement of the Lease termination was warranted as a matter of law, as a matter of equity and as a matter of discretion. His decision must be affirmed.

POINT II

THE LEASE WAS PROPERLY TERMINATED PURSUANT TO ITS PROVISIONS BY REASON OF OVERMYER'S DEFAULTS. UNDER MASSACHUSETTS LAW, THE LAND-LORD'S RIGHT TO TERMINATE THE LEASE AND OUST THE DEFAULTING TENANT WILL BE GIVEN FULL EFFECT.

Although the Bankruptcy Judge concluded that the debtors and Receiver did not seriously press their defense of inadequate notice of termination (Opinion, p. 12) and neither the debtors nor the Receiver raised such issue in their briefs, nonetheless they may yet seek to assert that contention upon this appeal. As will be demonstrated below, any such contention is totally without merit.

As set forth in detail above (pp. 4-5, supra), the undisputed proof upon the trial established the existence of numerous events of default entitling plaintiffs to terminate the Lease, including breaches of Overmyer's obligation to pay rent and taxes, the filing of the arrangement petition and the appointment of a Receiver.

There can be no doubt that the Lease was properly terminated by reason of such defaults. Thus, Section 15.02 of the Lease provides for its termination by service by the landlord of a written notice of election to terminate upon a specified date not less than 10 days after the mailing of such notice, the Lease to terminate on the date specified in the notice. In the present case, it is undisputed that such a notice, calling for the termination of the Lease on December 15, 1973 was mailed by plaintiffs' attorneys on December 4, 1973 (see Applicant's Exhibit 3; Tr. 7-8). Moreover, the service of the complaint in this action also fulfilled any requirement that notice of termination be given.

The Lease was thus properly terminated by reason of Overmyer's defaults and plaintiffs are entitled to immediate possession of the Premises (see Lease, §15.05). Under Massachusetts law, it is clear that termination clauses in leases based upon contractual default provisions will be fully enforced. See, e.g., Alloyd General Building Corp. v. Building Leasing Corp., 247 F.Supp. 922 (D. Mass. 1965), aff'd 361 F.2d 359 (1st Cir. 1966); cf. Choti Estates, Inc. v. Freda's Capri Restaurant, Inc., 332 Mass. 17, 123 N.E.2d 232, 237 (1954).

POINT III

THE ARGUMENTS ADVANCED BY THE RECEIVER AND THE DEBTORS IN THEIR APPEAL BRIEFS ARE WITHOUT MERIT.

In their respective briefs upon this appeal, the Receiver and debtors advance a variety of grounds upon which they contend the Bankruptcy Judge erred in not refusing to give effect to the termination of the Lease. Many of these arguments have already been refuted in the discussion contained in Point I of this Brief.* The major remaining arguments will be demonstrated in this Point III to be without merit.

A. The Contention That There Can be No Successful Plan of Arrangement Without the Properties Which Are the Subject of Their Appeals.

The Receiver argues that if the decision of the Bankruptcy Judge is allowed to stand and possession of the Premises involved upon these appeals is returned to the landlord plaintiffs, no successful plan of arrangement would be possible. This is so, the Receiver contends, by reason of the supposed

* The briefs of the Receiver and the debtors were not served until after the original date set for argument of this appeal, August 27, 1974. In the absence of any briefing schedule upon this expedited appeal prior to the original date set for argument, the bulk of Points I and II of this brief was written before receipt of the briefs of the Receiver and the debtors, in the expectancy that the argument would take place and the case would be submitted for decision on the date originally scheduled therefor.

fact that "the leases * * * constitute the primary business, and in most instances, the sole remaining asset of the Debtors" and that termination of the leases here "is the equivalent of an adjudication in bankruptcy". See Receiver's Brief, pp. 3, 22. As has already been demonstrated in Point I of this brief, such consideration, even if factually sound, would be insufficient under the totality of the circumstances presented here to warrant denial of enforcement of termination provisions of the leases. In any event, the Receiver can point to no evidence in the record which supports his contention.

In fact, the debtors' brief (p. 13) indicates that about 50 properties of the 200 or more warehouses in the possession of the debtors on the date of the Chapter XI petition herein are still left. Such figure is confirmed by a report recently filed with the Bankruptcy Judge showing some 51 properties still in possession of the Receiver. Thus, the 20 or so properties involved in these appeals do not constitute even half of the debtors' properties. Indeed, at a hearing held in August of this year before the Bankruptcy Judge with respect to the stay order, the Receiver's attorneys indicated that the properties in issue comprised about 2,000,000 square feet of the 7,000,000 square feet, or about 30%, of the warehouse space still in the possession of the Receiver.

There is nothing in the record to indicate that after possession of the premises in issue is restored to the landlord plaintiffs, a plan of arrangement cannot be proposed for an enterprise, albeit on a reduced scale, consisting of the remaining properties.

B. The Alleged Prejudice to "Other Creditors"

The Receiver asserts as one of the criteria which should be considered in determining whether the termination of the leases should be upset here, the alleged fact that termination would result in an undue advantage to the landlords in the present cases at the expense of other general creditors of the debtors. See Receiver's Brief, pp. 21, 22-23. This argument is legally incorrect and factually misleading. In the first place, it is incorrect to measure the effect of the exercise of the landlords' contractual rights of termination against the rights of creditors generally. The landlords' contractual termination rights exist independent of their rights as creditors. Insofar as the rights of the landlords as creditors of the debtors are concerned, there is nothing to indicate that the landlords will receive any greater percentage on their claims than any other creditors of the same class. That the landlords are the beneficiaries of bargained

for enforceable contractual provisions for their protection which will have the effect of preventing further losses and restoring their property to them should not properly be a matter for complaint by the Receiver, the debtor or unsecured creditors. Although not on all fours, a helpful analogy is the situation of the secured creditor, who by virtue of realization on his security pursuant to contractual provisions, winds up being made whole while unsecured creditors receive less than 100% of their claims and the debtor loses the property which was the subject of the security interest. In such instance, no one would seriously think of contending that the court should impede the secured creditors because of the less favorable result to unsecured creditors. By parity of reasoning, it is fallacious to argue, as the Receiver does, that the exercise of the landlord plaintiffs' termination rights should be thwarted because it would supposedly result in an advantage to them over other creditors.

Quite apart from the fallacious nature of the Receiver's legal argument, the Receiver's great solicitude for "other creditors" is misleading as well. The claims of whatever creditors there are other than landlords in these proceedings are minor. As the Bankruptcy Judge recognized in his Opinion (p. 9), "the landlord-purchasers represent the largest of the

creditors, by far, with whom the debtor hopes to deal in these arrangement proceedings." Many of such landlords, other than those involved in these appeals, also terminated their leases and have already received their properties back. See Receiver's Brief, p. 7; Debtors' Brief, p. 13. There is no valid reason why the landlords against whom the Receiver and the debtors have chosen to fight and thereby delay should be left without their properties and in a worse position than the landlords who received their properties back. Such would be the result however, if termination is refused. Thus, the supposed prejudice to "other creditors" by reason of termination is not a valid consideration here.*

C. The Tampa #3 Decision --
Absence of Rent Arrears
or Other Pre-Petition Defaults.

The Receiver argues that the Bankruptcy Judge made a decision inconsistent with the present cases when he refused to enforce a termination of the Tampa #3 lease, and that the reasoning and conclusion of the Bankruptcy Judge in Tampa #3 should be equally applicable to the present cases. See Receiver's Brief, pp. 30-40. The Receiver admits that Tampa #3

* The Receiver's reference at page 23 of his brief to the supposed prejudice to "a bank which has advanced several hundred thousand dollars to the Receiver" is also misleading. That bank is a secured creditor, secured by Receiver's certificates and an assignment of the debtors' receivables.

is factually distinguishable in that, unlike the present cases, there were no rent defaults or other pre-petition defaults, but argues that these defaults should be disregarded as immaterial. See Receiver's Brief, pp. 33-40. This argument is without merit.

In the first place, the Tampa #3 decision should be considered in the context in which it arose, namely, that the landlord therein did not seek to terminate the lease until six months had gone by from the date of the filing of the petition upon which such termination was based. Thus, the elements of waiver and estoppel were present, although the Bankruptcy Judge did not ostensibly base his decision thereon. Next, it is not clear from the decision in Tampa #3 precisely what the Bankruptcy Judge was holding and precisely what the grounds for such decision were. Thus, in response to an inquiry from counsel to the landlord, the Bankruptcy Judge agreed with counsel's statement that:

he [the Bankruptcy Judge] is not making any determination of the issue as to whether or not the lease is terminated on the basis of the default provision in the lease, but is only determining that the landlord's request for the premises is denied on the basis of Lane Foods.

Transcript of Tampa #3 Oral Opinion,
p. 53, annexed to Receiver's Brief.

However, the decision in In re Lane Foods, Inc., 213 F.Supp. 133, 136 (S.D.N.Y. 1963) referred to in the Tampa #3 case "stands for no more than the proposition that upon termination of a lease the referee may order that the debtor temporarily retain possession pending confirmation of the arrangement in order to avert the radical dislocation that would otherwise result from a forced eviction from the premises." Schokbeton Industries, Inc. v. Schokbeton Products Corp., 466 F.2d 171 at 176 (5th Cir. 1972) (emphasis in original). Yet earlier in the Tampa #3 decision, the Bankruptcy Judge, contrary to his unqualified view expressed at page 53 of the transcript, stated that he did not adopt that part of Lane Foods which held that the stay therein would at some point be terminated and stated further that he did "not find that the lease has in any respect been terminated." Tampa #3 Opinion, pp. 47-48.

As noted, the Tampa #3 decision is concededly distinguishable from the present cases in that, unlike the present cases, there were no rent defaults or other pre-petition defaults and evidently no finding of a pattern of defaults and inequitable conduct on the part of the debtor. Thus, unlike the present cases, the Bankruptcy Judge might well have been justified "on the very limited and narrow facts presented" in Tampa #3 (Tampa #3 Opinion, p. 50) in refusing to recognize termination. In any event, that case is presently on appeal and may well be reversed.

The Receiver's attempt to disregard the rental arrears in the instant cases in order to achieve a result similar to the Tampa #3 decision must fail. Thus, the Receiver's argument ignores all of the other pre-petition defaults by the debtors in the instant cases, such as failure to make needed repairs, failure to pay taxes, failure to furnish required documents, constant late payments and the reluctance of the landlords to have any more dealings with the debtors and their management. Even assuming, arguendo, that the existence of pre-petition rental defaults was the only distinction between the Tampa #3 case and the instant cases, such distinction would be more than sufficient to justify a contrary decision in the instant cases. Thus, one of the grounds urged by the Receiver (Brief, p. 34) for ignoring the rental defaults is that the proposed plan of arrangement provides for payment in full of all pre-petition arrears at or before confirmation. It is readily apparent that such proposed payment amounts to no more than an unenforceable hope at this time to pay the arrears sometime in the future, if and when the debtors are able to raise the enormous amounts of money necessary to finance the plan, if and when the plan is accepted by creditors and if and when the plan is confirmed by the Bankruptcy Court. Nothing in the record indicates the existence of any tangible prospects for the acceptance, confirmation and effectuation of such a

plan in the near future. If such proposed plan is the basis for a reversal of the Bankruptcy Judge's decision, the landlord plaintiffs, who have already been delayed more than nine months at considerable inconvenience and expense, will be delayed even longer to await the results of what at present can be described as only a dim possibility of a plan providing for full payment of arrears. The Bankruptcy Judge's finding that any such plan does not appear to be feasible (Opinion, pp. 27-28) is amply justified in view, among other things, of the admitted approximately \$1,000,000 in pre-petition arrears on the properties (see Debtors' Brief, p. 41) and the inability, despite the claimed profitability of the properties, of the Receiver to make timely use and occupation payments to the landlord plaintiffs during these Chapter XI proceedings. Indeed, the four to six week lag in such payments noted by the Bankruptcy Judge in his Opinion (p. 14) is now in excess of eight weeks. Thus, at the time this brief was being written, use and occupation payments for July of 1974 had not been made. And, the Receiver's attorneys have admitted to this Court that use and occupation payments for a particular month can be paid only by resort of rental payments collected in subsequent months.

The Receiver and the debtors also seek to excuse the tender of the defaulted pre-petition rent by claiming that any

such payment would violate the Sections 337(2) and 367(3) of the Bankruptcy Act and orders of the Bankruptcy Judge. (See Receiver's Brief, pp. 30-31, 34; Debtor's Brief, p. 44.) An examination of the statutes and orders cited reveals no such prohibition. Moreover, this assertion is belied by the fact that in these very proceedings, pre-petition arrears have been and are being paid as part of a settlement with one of the landlords whereby as a condition to reinstatement of the lease in question such payments are being made in addition to a new rental. And, it should be noted that the prohibitions relied upon by the Receiver and debtors did not prevent the debtor in the Queens Boulevard case from making a tender of the pre-petition rents.

The many and varied excuses asserted by the Receiver and debtors cannot mask the fact that they are presently unable to pay the rental arrears and have no reasonable prospect of being able to do so in the near future. And, quite apart from their inability to finance their supposed plan, the debtors have been unable to obtain anywhere near the requisite creditor acceptances, despite the fact that the plan has been outstanding since early 1974. Thus, any reliance upon such plan is wholly misplaced.

D. The Alleged Failure of the
Bankruptcy Judge to Make
Special Findings of Fact.

The Receiver contends that these cases should be remanded by reason of the fact that the Bankruptcy Judge allegedly failed to "find the facts specially and state separately * * * [his] conclusions of law thereon" with respect to each of the cases tried below, in contravention of Bankruptcy Rule 752. (See Receiver's Brief, pp. 49-52.) Such contention is unfounded.

Bankruptcy Rule 752 is admittedly adapted from Rule 52 of the Federal Rules of Civil Procedure. (See Receiver's Brief, p. 49.) The cases under Rule 52 provide a complete refutation of the Receiver's argument. Thus, the law is clear that

[t]he purpose of Rule 52(a) is satisfied if the trial court's findings are sufficient to afford a clear understanding of the ground upon which the court based its judgment.

Fluor Corp. v. United States,
ex rel Mosher Steel Co., 405
F. 2d 823, 828 (9th Cir. 1969).

See also Seligson v. Roth, 402 F.2d 883, 887 (9th Cir. 1968). All that is required is the "evidentiary basis" for the

decision on the issues presented. United States v. F. D. Rich Co., 439 F.2d 895, 898 (8th Cir. 1971). The opinion of the Bankruptcy Judge more than satisfies these tests. Thus, the Bankruptcy Judge specifically listed the various equities and criteria mentioned in the cases in which termination was refused and specifically found that not enough of such factors existed in any of the present cases to justify the application of his discretionary equitable powers to refuse to give effect to the terminations here. See Opinion, pp. 26-28. Thus, it is quite evident from the Bankruptcy Judge's opinion what the grounds of his decision were. Nothing more was required.

Moreover, the Receiver and the debtors received the benefit of the Bankruptcy Judge's general conclusion that all of the sublease operations involved in these disputes "yield a substantial profit", when many of these properties were actually marginal or loss operations. This is borne out by the Receiver's failure to prosecute his appeal on one-third (8 out of 24) of the leases at issue. See Receiver's Brief, p. 8. Furthermore, it ill behooves appellants to complain of lack of specificity of the findings as to each of the leases in question, when nowhere in their briefs or in the record is there any proof as to the financial or operational status of each of the debtors as a separate entity. And, throughout

the trials, appellants had no hesitancy about treating the various debtors as one entity. Thus, for example, on the issue of maintenance expense, the appellants were successful in pressing for a finding of an annual expense of 2 cents per square foot (\$200 per month per 120,000 square foot warehouse) based upon the national average for the Overmyer organization, despite the admitted fact that maintenance expenses varied from property to property.

E. The Debtors' Claim That Section 70b is Inapplicable to Chapter XI.

The debtors go to great lengths in their brief (pp. 25-37) to attempt to support their contention that Section 70b of the Bankruptcy Act is not applicable to Chapter XI. Unfortunately, this contention is contrary to all the reported cases and the leading authorities. Thus, as set forth in 8 Collier, Bankruptcy ¶ 3.15 [3] n. 14 (14 ed. 1971):

§ 70b provides in part that "an express covenant that an assignment by operation of law or the bankruptcy of a specified party thereto or of either party shall terminate the lease or give the other party an election to terminate the same shall be enforceable." That provision is applicable in a Chapter XI proceeding. (Emphasis supplied.)

See, e.g., In re Speare, 360 F.2d 882 (2d Cir. 1966); Urban Properties Corp. v. Benson, Inc., 116 F.2d 321 (9th Cir. 1940). And, of course, the Queens Boulevard case itself, a Chapter XI proceeding, expressly states that Section 70b is "made applicable here by Section 302 of the Act."

F. There Is No Evidence as to the Existence Or the Amount of Any "Windfall" to the Landlord Plaintiffs as the Result of the Lease Terminations.

Throughout their briefs, both the Receiver and the debtors claim that the landlord plaintiffs will receive a "windfall" if the lease terminations are permitted to stand. This conclusion follows, they claim, from the fact that certain of the leases presently throw off a profit to the Receiver, which profit will be appropriated by the landlords upon ouster of the Receiver and debtors from possession. See, e.g., Receiver's Brief, pp. 3, 21. In the first place, there is no assurance that because a lease may be profitable to Overmyer, it will be profitable to the particular landlord plaintiff involved. Moreover, quite apart from the fact that the only alternative to any such supposed "windfall" is the continuation of Overmyer as a tenant and the likelihood of continued defaults, inconvenience, expense and foreclosure threats, there is no evidence in the record as to what the extent of

any such supposed "windfall" is in any case. The debtors attempt to supply such deficiency by annexing a schedule to their brief showing a figure for "Projected Gross Profit Over Life Of Lease and Renewal Option". However, no such figures appear in the record and indeed, in an early trial involving a landlord represented by the Henry & Brecker firm, an attempt by the appellants to establish such projected value through supposed expert testimony was rejected by the Bankruptcy Judge as speculative and hearsay. In the later trials, including the trials involving the landlords represented by the undersigned, appellants did not even attempt to establish such value. Moreover, in view of the vicissitudes of the economy and the real estate market, there is no assurance that a lease which is profitable today will be profitable 5, 10 or 20 years from now. Thus, any considerations of possible "windfalls" to the landlord plaintiffs are purely speculative and unsupported by the record.

G. The Allocation of Expenses of the Debtors' Operations.

The debtors now argue (Debtors' Brief, p. 12) that "[t]he Court in determining the debtors' equity in the properties should have viewed direct income and expenses on a building by building basis rather than plugging in an overall

estimated cost to the debtors per building, which included expense overhead of a New York operation". The simple answer to this contention is that the debtors participated in the April 18, 1974 evidentiary hearing at which such estimated cost (\$20,000 per 120,000 square foot building per annum) was arrived at and never objected to the procedure used, which in fact was agreed to by all interested parties. See Transcript of April 18, 1974. Moreover, it is self-evident that the costs of running the central New York office are a proper consideration in determining profitability on the various properties. Otherwise, certain administrative expenses with respect to the various properties would simply be lost in a general overall financial statement and no true picture of profitability of the various properties could be obtained.

Moreover, the \$20,000 figure was an approximation made by the Court after lengthy testimony so as to avoid even more lengthy and protracted cross-examination of the witnesses for the Receiver on each item properly considered to be an expense of the operation of the properties. In fact, the record shows that the \$20,000 figure was a "light" approximation agreed to by all parties present, and did not include significant expense items such as brokerage commissions

incurred in connection with the constant short-term subletting, which is the essence of the debtors' business, or a reserve for vacancies. See, e.g., Transcript of April 18, 1974, pp. 86-89. Had testimony been given as to these expense items, the \$20,000 figure would surely have been much greater.

H. The Myth of Overmyer as a Viable Enterprise.

The Debtors' Brief (p. 1) attempts to convey the impression that the Overmyer operation was basically a sound one which ran into cash flow difficulties in 1973 as the result of extrinsic economic forces prevalent in the nation's economy. The picture sought to be painted by the debtors has no support in the record. Indeed, if any conclusions can be drawn from the evidence adduced at trial with respect to the various leaseholds and Overmyer's dealings with the various landlords, it must be concluded that the Overmyer operation was unprofitable from the outset and continued to be unprofitable until the commencement of these proceedings and thereafter. Thus, as demonstrated above, Overmyer was constantly late in the payment of rent, taxes and in fulfilling its other obligations, had evidently operated on the principle of "delay-default-cure if necessary" so as to juggle its available cash, and where necessary, had litigated wherever

such litigation would further delay meeting its obligations.

See, e.g., D. H. Overmyer Co. v. Frick Co., 405 U.S. 174 (1972). Using these tactics, Overmyer was able until late last year to remain one step ahead of massive lease terminations and foreclosures. It is submitted that the history of the Overmyer operation is relevant to a court of equity in its determination as to whether to invoke "high equity" to prevent lease terminations.

I. The Bankruptcy Judge's Supposed "Prejudgment" of These Cases.

The debtors make the desperate contention in their brief (pp. 3, 39-41) that the Bankruptcy Judge prejudged these cases by his statements prior to trials herein. Such claim is belied not only by the careful and well-reasoned Opinion of the Bankruptcy Judge, but also by the fact that the Bankruptcy Judge would have been justified in adjudicating the debtors bankrupts on a variety of grounds unrelated to these actions, but did not do so despite repeated demands for adjudication from the creditors. Indeed, the history of these proceedings shows that the Bankruptcy Judge leaned over backwards not to adjudicate and to thereby give the debtors and the Receiver a full opportunity to litigate these actions on the merits. Thus, for example, the Bankruptcy Judge could have adjudicated

the debtors bankrupts pursuant to Section 376 of the Act for failure to file acceptances to the proposed plan of arrangement. Instead, the Bankruptcy Judge continued to adjourn the time for filing such acceptances. Similarly, the Bankruptcy Judge could have ordered the debtors to post indemnity pursuant to Section 326 of the Act and Rule XI-4 of the Bankruptcy Rules of this Court and then adjudicated the debtors bankrupts pursuant to Section 327 upon their likely failure to comply with such an order. Instead, the Bankruptcy Judge has continued to adjourn the Rule XI-4 indemnity hearing. And, significantly, despite the fact that the payment of use and occupation has been from 4 to 6 weeks late and now is over 8 weeks late, the Bankruptcy Judge has steadfastly refused to adjudicate. Such conduct can hardly be deemed a "pre-disposition" against the debtors.

Summary

No compelling equitable or policy reasons exist for refusal to give effect to plaintiffs' termination of the Lease. The findings of fact made by the Bankruptcy Judge were not clearly erroneous and his decision not to refuse enforcement of the termination was not an abuse of discretion. None of the arguments raised in appellants' briefs has any merit. Plaintiffs have properly terminated the Lease and are entitled to immediate

possession of the Premises.

Conclusion

The order and judgment of the Bankruptcy Judge must be affirmed in all respects.

Respectfully submitted,

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Of Counsel.

OFFICE COPY

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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In the Matters of D. H. OVERMYER CO., :
INC. (incorporated under the laws of :
Florida), et ano., :

Debtors, : In Proceedings For
SAMUEL H. POKRASS and SYLVIA POKRASS, : Arrangements Nos.
: 73 B 1134 and
: 73 B 1129
Plaintiffs-Respondents, :
-against- :
D. H. OVERMYER CO., INC., etc., et al., :
Defendants-Appellants. :

- - - - - x

MEMORANDUM OF PLAINTIFFS-
RESPONDENTS SAMUEL H.
POKRASS AND SYLVIA POKRASS

Theodore Gewertz
Allen P. Rosiny
Of Counsel.

WACHTELL, LIPTON, ROSEN & KATZ
209 PARK AVENUE • NEW YORK, N.Y. 10017
Attorneys for Plaintiffs-Respondents

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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In the Matters of D. H. OVERMYER CO., :
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Debtors, : In Proceedings for
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Plaintiffs-Respondents, : 73 B 1134 and
-against- : 73 B 1129
D. H. OVERMYER CO., INC., etc., et al., :
Defendants-Appellants. :

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MEMORANDUM OF PLAINTIFFS-
RESPONDENTS SAMUEL H.
POKRASS AND SYLVIA POKRASS

Statement

This memorandum is submitted on behalf of plaintiffs-
respondents Samuel H. Pokrass and Sylvia Pokrass, landlords of
certain warehouse premises referred to on debtors' books and
records as Miami #2 (the "Premises") in opposition to the appeal
of the Receiver and debtors from the order and judgment of the
Honorable Roy Babitt, Bankruptcy Judge, dated August 6, 1974
which, pursuant to a written opinion dated July 23, 1974,

declared the lease (the "Lease") between plaintiffs and the debtor D. H. Overmyer Co., Inc. (Florida) (hereinafter "Overmyer") terminated and directed that the Receiver and Overmyer surrender possession of the Premises to plaintiffs.

Statement of Facts

The facts with respect to this action and the other actions encompassed within the July 23, 1974 opinion of the Bankruptcy Judge are basically similar. Briefly, in each instance each group of landlord plaintiffs purchased from the respective debtors* real property consisting of land and warehouse facilities. Concurrently therewith the landlord plaintiffs leased the premises back to the debtors pursuant to written long term "net leases" whereby the debtors, in addition to their fixed monthly rental obligation, were required to make all cash expenditures with respect to the premises (including insurance, taxes, and expenditures for repairs), except for interest and amortization on the respective fee mortgages. The debtors either directly or indirectly through an affiliated corporation sublet the premises to users of the warehouse space, usually on a short term basis (see Opinion, pp. 6-7).

* When used hereinafter the term "debtors" will refer to the Overmyer organization as a whole, including the separate Overmyer companies in each state which held title to the warehouses involved in the actions which are the subject of the July 23, 1974 opinion and this appeal.

Prior to the filing of the petitions for arrangements, the debtors' business collectively consisted of the rental of warehouse space to subtenants at some 200 to 250 sites leased by the debtors and the operation of public warehousing facilities at certain of those sites. Shortly after the commencement of these arrangement proceedings, the public warehousing operations were discontinued (Opinion, p. 6). It would appear that since the inception of these proceedings on November 16, 1973, the debtors have rejected leases at approximately 200 sites and have returned possession of such premises to the respective owners thereof, leaving the debtors with about 40 sites, approximately 20 of which are involved in these appeals (see Opinion, p. 7).

The Lease in the present action provides for a net monthly rental of \$5,968.67. A stipulation between the parties as to what the testimony of the Receiver's sales manager would be, sets forth that the Receiver was earning approximately \$7,363 per month from the property, before insurance, maintenance, home office expenses, administrative expense, brokerage expense and the like. At the minimum, such expenses amount to \$20,000 per year (\$1,667 per month) for a 120,000 square foot property such as Miami #2 (Transcript of April 18, 1974, p. 87;

Tr. 57-58).* After giving effect to such expenses, the profit to the Receiver is \$5,696 per month.

Section 15.01(b) of the Lease provides, inter alia, that it shall be an event of default "if Tenant shall file for reorganization or for an arrangement pursuant to the Bankruptcy Act of the United States * * * ." Other events of default include the failure to pay rent within 10 days after notice that payment is due -- §15.01(a), and the appointment, in a proceeding brought by the Tenant, of a receiver or trustee of all or a substantial part of the Tenant's property -- §15(c).

The undisputed proof upon trial established the existence of numerous events of default entitling plaintiffs to terminate the Lease. Thus, pursuant to Section 15.01(b) of the Lease (Applicant's Exhibit 1), the filing of the petition for an arrangement herein on November 16, 1973 pursuant to the Bankruptcy Act was an event of default. Likewise, pursuant to Section

* All references in this memorandum prefaced by "Tr." are to the pages of the transcript of the trial of this action.

15.01(c) of the Lease, the appointment of Mr. Herzog as Receiver (and for a short time as Trustee) was also an event of default. Furthermore, the failure of Overmyer to pay the rental installments in the amount of \$5,968.67 each,* due on October 1, 1973 and November 1, 1973, within 15 days after having been given notice that such payments were due (such notice having been given through a letter dated December 12, 1973 to Mr. Herzog, who was then Trustee and to his attorneys [Applicant's Exhibit 3] and also by the service upon Overmyer and Mr. Herzog on December 12, 1973 of the complaint in this action) constituted yet another default. Other defaults included the breach by Overmyer of its obligation under the Lease to pay as additional rent the real estate taxes due for 1973 (§§3.02, 4.01; Tr. 15-16); its unauthorized alteration of the Premises (§6.02; Tr. 21); its reduction of the insurance in force from \$800,000 to \$250,000 (§12.03; Tr. 23-25); and its failure to furnish plaintiffs with copies of its subleases and financial statements (§§7.01, 26.03; Tr. 18, 20-21).

Section 15.02 of the Lease provides for its termination by service by the landlord of a written notice of election to terminate upon a specified date not less than 30 days after the mailing of such notice, the Lease to terminate on

* The figure in Exhibit "A" to the Receiver's Brief of only \$8,900 for pre-petition lease defaults is thus manifestly incorrect. Thus, the rental defaults alone amount to \$11,937.34 without regard to interest on late rental payments and unpaid taxes.

the date specified in the notice. In the present case, it is undisputed that such a notice, calling for the termination of the Lease on January 14, 1974 was mailed by plaintiffs' attorneys on December 12, 1973 (see Applicant's Exhibit 3; Tr. 9).

Quite apart from the events of default upon which the complaint herein is predicated, the proof upon trial showed that there was a consistent pattern on the part of Overmyer of defaulting upon its obligations under the Lease, which conduct commenced long prior to the filing of the arrangement petition herein. Thus, the uncontradicted testimony on plaintiffs' case established that:

- (a) Overmyer was late in the payment of rent "At least four or five dozen times" (Tr. 12-13, 54; Applicant's Exhibit 8); with the result that plaintiffs had to resort to their own funds as a source of mortgage payments (Tr. 22-23);
- (b) Overmyer constantly failed to make real estate tax payments on time, with the result that the mortgagee of the Premises threatened foreclosure (Tr. 15-17, Applicant's Exhibit 5);
- (c) By reason of Overmyer's failure to pay 1972 taxes, plaintiffs were forced to use their own funds to pay such taxes (Tr. 16);
- (d) Overmyer made substantial alterations to the Premises without even asking plaintiffs for permission to make such alterations (Tr. 21);

- (e) Although required to do so under the Lease, Overmyer never furnished plaintiffs with copies of any of Overmyer's financial statements or of the sub-leases with respect to the Premises (Tr. 18-20); and
- (f) Overmyer, though required by the Lease to maintain fire insurance in the amount of \$800,000, reduced the fire insurance on the Premises to \$250,000, and plaintiffs had to secure a new policy, at their own expense, in the amount of \$800,000 (Tr. 23-25, 42-43; Applicant's Exhibits 6, 7).

Moreover, it is readily apparent that each and every one of the foregoing defaults was willful and indicative of Overmyer's total disregard of its obligations under the Lease. Indeed, when plaintiffs complained about other defaults, Overmyer's Executive Vice President replied that because plaintiffs had commenced legal action against Overmyer in Florida, "I have recommended to Management [that] they do not make any further payment of rent to Mr. Pokrass until such time as they are ordered to do so by the Court." (Applicant's Exhibit 9.) Overmyer's total irresponsibility and contempt for its obligations is further underscored by the fact that, apparently at the same time that plaintiffs were paying taxes and insurance premiums out of their own pocket and were being denied their monthly rental of \$5,968.67,

Overmyer was receiving monthly rentals of \$14,637.22 from its subtenants (Stipulation dated January 23, 1974).

In view of the foregoing constant pattern of willful default by Overmyer and the consequent expense and inconvenience caused to plaintiffs thereby, it is not surprising that when Overmyer's counsel asked if plaintiffs would be willing to continue the Lease if Overmyer were to pay its arreased rents,* plaintiff Samuel Pokrass responded:

Hell, no * * *. Because I can't be badgered anymore; I can't be bothered anymore. I got one heart attack on account of, I am going to get surely a second one if I keep dealing with D. H. Overmyer.

(Tr. 48-49.)

Prior Proceedings

This adversary proceeding was commenced on December 12, 1973 with the service and filing of plaintiffs' complaint and the summons and notice of trial. The complaint alleged termination of the Lease not only by reason of the bankruptcy and receiver clauses thereof (Sections 15.01(b) and (c)), but

* As found by the Bankruptcy Judge, the aggregate pre-petition arrearages under all of the debtors' leases is well in excess of \$12,000,000 (Opinion, p. 9).

also by reason of Overmyer's failure to make October and November, 1973 rent payments (Section 15.01(a)). Answers were served by Overmyer and the Receiver. The defenses asserted by each were: (1) that the court in its discretion could relieve against the termination of the Lease and the forfeiture of Overmyer's interest therein by reason of "technical default" under the "bankruptcy" clause in the Lease, on the ground that such termination and forfeiture would constitute a penalty and unjust enrichment to the landlord plaintiffs where all defaults would be cured in a duly confirmed plan of arrangement; (2) that the court should, in the exercise of its discretion, allow Overmyer to remain in possession pending negotiations between Overmyer and its creditors for a plan of arrangement; and (3) that the complaint was premature in that plaintiffs had allegedly not given the proper notice or notices of termination required under the Lease.

The action was tried on January 15 and April 18, 1974. By written opinion dated July 23, 1974, the Bankruptcy Judge decided that plaintiffs' termination of the Lease would be given effect and that plaintiffs were entitled to immediate possession of the Premises. An order and judgment thereon was entered on

August 6, 1974. The appeal of Overmyer and the Receiver from that order and judgment followed.

The Opinion of the Bankruptcy Judge

The Bankruptcy Judge issued a blanket opinion covering the approximately 20 adversary actions commenced by the various landlord plaintiffs seeking to recover possession of their warehouse properties from the various debtors and the Receiver. In the Bankruptcy Judge's view, the only real issue was whether there existed "compelling equitable and policy considerations" which required the exercise of the court's discretionary equitable power to refuse enforcement of the otherwise enforceable termination clauses in the leases. See Matter of Queens Boulevard Wine & Liquor Corp., ___ F.2d ___ (2d Cir. June 11, 1974). The Bankruptcy Judge held that no such compelling considerations existed in the present cases. Thus, the Bankruptcy Judge observed that Overmyer is neither a company which serves the public at large, such as the railroad in Smith v. Hoboken R. Co., 328 U.S. 113 (1946), nor a company with public shareholders or debtholders whose investments would be wiped out by a termination of the leases, such as the Chapter X debtors in In re Fleetwood, 335 F.2d 857 (3d

Cir. 1964) and Weaver v. Hutson, 459 F.2d 741 (4th Cir. 1972). Further, the Bankruptcy Judge found, on the undisputed facts, that none of the equitable considerations present in the Queens Boulevard case, supra, were present in the instant cases. Thus, in contrast to the Queens Boulevard case, the Bankruptcy Judge found the defaults in the present cases to be "staggering" rather than merely a default in payment of one month's rent as in the Queens Boulevard case; the properties in question here are not the debtors' only warehouses; there was no tender of the arrearages and no such tender could be made "in light of the aggregate of the pre-petition debt due these landlords who make up the bulk of the debtor's creditors"; the termination clauses are clear and unambiguous and not subject to amelioration by the debtors; no conduct on the part of the landlords even suggests forbearance or waiver of defaults on their part; no feasible plan of arrangement has been accepted or offered; and it is doubtful whether any such plan of arrangement could ever be offered (Opinion, pp. 26-29). Under such circumstances, the Bankruptcy Judge concluded that "the termination clauses in issue are enforceable against the debtor, and on the facts here, and in the exercise of its equitable jurisdiction * * * should be enforced." Opinion, p. 30.

POINT I

THE TERMINATION OF THE
LEASE BY PLAINTIFFS MUST
BE GIVEN EFFECT.

The Court of Appeals for this Second Circuit has consistently recognized that, absent some sort of waiver or estoppel, or compelling equitable and policy considerations, the fact that a corporation may be in an arrangement or reorganization proceeding does not deprive a landlord of his contractual right to terminate a lease upon the occurrence of an event of default therein. See, e.g., Model Dairy Co. v. Foltis-Fischer, Inc., 67 F.2d 704, 706 (2d Cir. 1933); In re Walker, 93 F.2d 281 (2d Cir. 1937); B.J.M. Realty Corp. v. Ruggieri, 326 F.2d 281, 282 (2d Cir. 1963); Davidson v. Shultz, 354 F.2d 946, 948 (2d Cir. 1966); In re Speare, 360 F.2d 882 at 877 (2d Cir. 1966); Matter of Queens Boulevard Wine & Liquor Corp., ___ F.2d ___ (2d Cir. June 11, 1974). As stated by the Court in the B.J.M. Realty Corp. case:

Though we are loath to subject reorganization proceedings to disruption by permitting forfeiture of a lease, the landlord's contractual right cannot be disregarded without clear evidence that he intended to abandon it.

326 F.2d at 284.
(Emphasis supplied.)

The enforceability of the landlord's right to terminate has long been recognized both by the Supreme Court (see Finn v. Meighan, 325 U.S. 300, 302 [1944] -- "an express covenant of forfeiture has long been held to be enforceable against the bankruptcy trustee.") and the Bankruptcy Act itself. See §70b, which provides in relevant part:

an express covenant that an assignment by operation of law or the bankruptcy of a specified party thereto or of either party shall terminate the lease or give the other party an election to terminate the same is enforceable.

See also 8 Collier, Bankruptcy §3.15[4] n. 16 (14th ed. 1971). And, in the present case, the Bankruptcy Judge specifically held that "[T]his case does not turn on resolution of the issue whether or not termination clauses such as those here, are enforceable in these Chapter XI proceedings" (Opinion, pp. 15-16).

As was recognized by the Bankruptcy Judge (Opinion, pp. 20-21), the dispositive issue in the present case is whether or not there exist "compelling equitable and policy considerations" requiring the bankruptcy court to exercise its equitable power, recognized by the Second Circuit in Matter of Queens Boulevard Wine & Liquor Corp., ___ F.2d ___ (2d Cir. June 11, 1974), to

refuse to enforce a lease termination provision. It is submitted that the Bankruptcy Judge was eminently correct in holding that the Queens Boulevard decision and rationale had no application to "the facts present here" in that "[t]he debtor here neither presents the appealing facts of Queens Boulevard nor any of 'the particular circumstances' there" (Opinion, p. 27).

Thus, in Queens Boulevard, the premises in question were the debtor's sole place of business; only one month's rent was in default at the time the Chapter XI petition was filed; there were no defaults in any of the other terms of the lease; the basis for termination was only the bankruptcy clause and not defaults in the payment of rent or taxes also; prior to the notice of termination the debtor offered to pay all the unpaid rent which the landlord indicated it would accept; the landlord did not attempt to terminate until after it had received an offer to lease the premises at a higher rent; upon the hearing before the Referee the debtor tendered a certified check for all rent then due, including rent for the period prior to the filing of the petition; the lease in question contained a clause negating termination by reason of the arrangement proceeding if timely payment of all rent was made; a plan of arrangement had been tentatively agreed to by the

debtor's creditors and the rehabilitation prospects for the debtor were excellent; payments for use and occupancy while the arrangement proceedings were pending were promptly made; and the landlord was fully secured by, but did not resort to, a sizeable security deposit. None of such factors or comparable factors exist in the present situation, and as noted, the Bankruptcy Judge so held. See Opinion, pp. 26-29.

The law is clear that upon this appeal, these findings of the Bankruptcy Judge may not be set aside unless clearly erroneous. See Rules 752 and 810 of the Rules of Bankruptcy Practice. Thus, Rule 810 provides:

Upon an appeal the district court may affirm, modify, or reverse a referee's judgment or order, or remand with instructions for further proceedings. The court shall accept the referee's findings of fact unless they are clearly erroneous, and shall give due regard to the opportunity of the referee to judge the credibility of the witness. (Emphasis supplied.)

See also 2A Collier, Bankruptcy §29.28 (14th ed. 1974) and cases cited therein.

Moreover, the essence of the defenses raised by Overmyer and the Receiver are admittedly and expressly directed to the

bankruptcy court's equitable "discretion" to relieve against forfeitures in certain limited circumstances. See Answers of Receiver and Debtor, §§ 10, 11 and 13. As shown, the Bankruptcy Judge, in his "discretion" declined to refuse to enforce the termination clause, finding an absence of any circumstances warranting non-enforcement. It is well established that the exercise of discretion by the Bankruptcy Judge on matters within his discretion will not be disturbed unless that discretion has been abused. As stated by the Second Circuit in Matter of Transvision, Inc., 217 F.2d 243, 246 (2d Cir. 1954), cert. denied, 348 U.S. 952 (1955):

[T]his determination * * * is one within the purview of the district court's discretionary exercise of its equity powers * * * and unless the petitioner's corporate and financial condition is demonstrably such as to indicate that the district court has abused that discretion, its determination should be sustained.

(Emphasis supplied.)

See also, Duggan v. Franklin Square Nat. Bank, 170 F.2d 922, 924 (2d Cir. 1948); Gold v. John R. Blair Co., 142 F.2d 144 (2d Cir. 1944); Goldstein v. Wolfson, 132 F.2d 624, 626 (2d Cir. 1943); Benitez v. Bank of Nova Scotia, 110 F.2d 169, 174 (1st Cir. 1940); Sampsell v. Norrell, 162 F.2d 4, 7 (9th Cir. 1947); In re McGoldrick, 121 F.2d 746, 750 (9th Cir.), cert. denied, 314 U.S. 675 (1941).

In the present case, not only was there no abuse of discretion on the part of the Bankruptcy Judge in giving effect to the termination of the Lease, but it would have been an abuse of discretion not to enforce the termination. Thus, quite apart from the total lack of affirmative "compelling equitable and policy considerations" in favor of Overmyer, the proof adduced at trial shows that Overmyer has consistently been in willful default and has not acted in good faith toward the plaintiffs. As demonstrated, this is not a situation where there was simply an isolated failure to timely pay one or two rental installments; rather, it is the culmination of a history of repeated willful defaults over many months and years, not only in the timely payment of rent, but in the fulfillment of Overmyer's Lease obligation to pay taxes, to maintain insurance, to keep the Premises free from liens, to provide information and furnish documentation to plaintiffs, and to fulfill Overmyer's other obligations under the Lease (see pp. 6-8, supra). And, as noted, Overmyer's arrogance and contempt for its obligations is exemplified by its attempt to use the fact that plaintiffs had complained about other defaults and had commenced legal action in the state court against Overmyer as a justification for an announced refusal to pay rent until ordered to do so by that court (see Applicant's Exhibit 9). Thus, Overmyer has not acted responsibly in the past and there is no reason to believe it will act responsibly in the future. There is no equity whatsoever on its side.

Whatever equity exists in this situation belongs to plaintiffs. It is plaintiffs who have had to meet taxes and other obligations of Overmyer; it is plaintiffs who have had to resort to their own funds to meet mortgage payments which if not made would lead to the wiping out of not only plaintiffs' interest in the Premises, but Overmyer's lease interest as well; it is plaintiffs who have been required to worry about problems of repairs, maintenance, insurance, liens and the like. Thus, even if the Bankruptcy Judge had the discretionary equitable power to refuse to enforce the termination clause in the Lease, any such refusal in this case would have been an abuse of discretion in view of the total lack of equity on the part of Overmyer, much less the absence of any affirmative "compelling equitable and policy considerations" in Overmyer's favor.

Implicit in the Bankruptcy Judge's decision that no "compelling equitable and policy considerations" existed which justified refusal to give effect to the termination of the Lease, was the conclusion that the mere fact that the Lease is profitable to Overmyer, did not justify non-enforcement of such termination. Such conclusion was indisputably correct. See, e.g., Schokbeton Industries, Inc. v. Schokbeton Prods. Corp., 466 F.2d 171 (5th Cir. 1972), wherein the court refused to deny effect to termination of a licensing agreement claimed to be the debtor's "most valuable asset." As stated therein:

We do not overlook the fact that in addition to providing a swift and economical method for facilitating simple compositions among relatively sophisticated unsecured creditors, a Chapter XI arrangement is even more vitally concerned with the ultimate rehabilitation of the debtor. Nor do we disregard the referee's findings of fact that the loss of the exclusive franchise will seriously jeopardize Debtor's competitive position and cause it irreparable injury. We conclude that this is simply not a case for the invocation of high equity.

466 F.2d at 177 (Emphasis supplied).

In addition to the Queens Boulevard case, Overmyer and the Receiver may also seek to rely upon the cases from other circuits whose reasoning the Queens Boulevard court found persuasive, namely Weaver v. Hutson, 459 F.2d 741 (4th Cir. 1972) and In re Fleetwood Motel Corp., 335 F.2d 857 (3d Cir. 1964). Neither case has any relevance here. As stated by the Bankruptcy Judge:

Weaver and Fleetwood both involved, in Chapter X proceedings, large public investment in those debtors and an expression of concern by the Securities and Exchange Commission that enforcement of the termination clauses would end the debtor's operation to the detriment of the public debt. While it is true that in Weaver the court declined to grant a "windfall" possession to the pressing landlord, the concern there was for the public investors who would be wiped out unless there was a res which the debtor could operate en route to successful reorganization.

The debtor here is not seeking reorganization under Chapter X. Indeed, in the absence of public debt or public holding of its stock, the appropriate vehicle is the Chapter XI statutory scheme, which it chose. SEC v. American Trailer Rental Co., 379 U.S. 594, 613-618 (1965). But while Chapter XI may have the laudable purpose of rehabilitating strapped debtors, it is no guarantee of continued existence to every plagued company. In re Webcor,

Inc., 392 F.2d 893 (7th Cir. 1968), cert. denied 393 U.S. 837 (1968) sub. nom. Silver, Inc. v. Webcor, Inc. It is certainly no guarantee that this court's broad power of injunction under the scheme of Chapter XI will be utilized to bar the landlords from their property under clear and plain speaking bargains made with debtors whose financial condition may have become precarious years later and where the landlords have been seriously impeded, a fact noted by Judge Brieant of this court in Matter of Unishop, Inc., unreported, 73 B 1208 (S.D.N.Y. March 4, 1974), affirmed without comment on this point, 494 F.2d 689 (2d Cir. 1974), and very much present here.

Opinion, pp. 23-24
(Emphasis supplied).

Moreover, in the Fleetwood and Weaver cases, the result of enforcement of the termination clauses would have been to turn over to the landlord costly motel buildings owned by the tenants which had been constructed on land owned by the landlords. By contrast, in the present situation, the warehouse buildings themselves, as well as the land, are owned by the landlords who are obligated to pay the mortgages thereon. As the proof upon trial demonstrated, the rental payments required to be made by Overmyer were the primary source for payment of the mortgages by plaintiffs; such payment and consequently plaintiffs' ownership of the property was threatened by Overmyer's constant failure to make rental payments (see Opinion, p. 11; Tr. 15-17, 22-23). Thus, enforcement of the termination provisions in the Lease is necessary to prevent jeopardy to the plaintiffs' financial interest, a factor expressly found to be absent in the Weaver and Queens Boulevard cases.

In sum, the Bankruptcy Judge's enforcement of the Lease termination was warranted as a matter of law, as a matter of equity and as a matter of discretion. His decision must be affirmed.

POINT II

THE LEASE WAS PROPERLY TERMINATED PURSUANT TO ITS PROVISIONS BY REASON OF OVERMYER'S DEFAULTS. UNDER FLORIDA LAW, THE LANDLORD'S RIGHT TO TERMINATE THE LEASE AND OUST THE DEFAULTING TENANT WILL BE GIVEN FULL EFFECT.

Although the Bankruptcy Judge concluded that the debtors and Receiver did not seriously press their defense of inadequate notice of termination (Opinion, p. 12) and neither the debtors nor the Receiver raised such issue in their briefs, nonetheless they may seek to assert that contention upon this appeal. As will be demonstrated below, any such contention is totally without merit.

As set forth in detail above (pp. 4-5, supra), the undisputed proof upon the trial established the existence of numerous events of default entitling plaintiffs to terminate the Lease, including breaches of Overmyer's obligation to pay rent and taxes, the filing of the arrangement petition and the appointment of a Receiver.

There can be no doubt that the Lease was properly terminated by reason of such defaults. Thus, Section 15.02 of the Lease provides for its termination by service by the landlord of a written notice of election to terminate upon a

specified date not less than 30 days after the mailing of such notice, the Lease to terminate on the date specified in the notice. In the present case, it is undisputed that such a notice, calling for the termination of the Lease on January 14, 1974 was mailed by plaintiffs' attorneys on December 12, 1973 (see Applicant's Exhibit 3; Tr. 9). Moreover, the service of the complaint in this action also fulfilled any requirement that notice of termination be given.

The Lease was thus properly terminated by reason of Overmyer's defaults and plaintiffs are entitled to immediate possession of the Premises (see Lease, §15.05). Under Florida law, it is clear that termination clauses in leases based upon contractual default provisions will be strictly enforced. See, e.g., 6701 Realty, Inc. v. Deauville Enterprises, Inc., 84 So. 2d 325 (Fla. 1955); Mayflower Associates, Inc. v. Elliott, 81 So. 2d 719 (Fla. 1955); cf. Stephenson v. National Bank, 39 F.2d 16 (5th Cir. 1930).*

* Indeed, even in the absence of the termination clause, the Florida Delinquent Tenant Act (F.S.A. §83.05) gives the plaintiffs an absolute right to terminate the Lease upon three days' default. See, e.g., State ex rel Rich v. Ward, 135 Fla. 885, 185 So. 846 (1939); Ex parte Bienville Investment Company, Inc., 102 Fla. 524, 136 So. 328 (1931); Brownlee v. Sussman, 238 So. 2d 317 (Fla. Dist. Ct. of Appeals 1970); cf. Stephenson v. National Bank, *supra*. It should be noted that under this act, the only defense to forfeiture of the Lease is tender of payment. Mayflower Associates, Inc. v. Elliott, *supra*. Moreover, the Fifth Circuit has held that this statutory right to terminate and regain possession will not be defeated by the institution of bankruptcy proceedings. See Gerstel v. Shaw, 71 F.2d 371, 373 (5th Cir. 1934).

POINT III

THE ARGUMENTS ADVANCED BY THE RECEIVER AND THE DEBTORS IN THEIR APPEAL BRIEFS ARE WITHOUT MERIT.

In their respective briefs upon this appeal, the Receiver and debtors advance a variety of grounds upon which they contend the Bankruptcy Judge erred in not refusing to give effect to the termination of the Lease. Many of these arguments have already been refuted in the discussion contained in Point I of this Brief.* The major remaining arguments will be demonstrated in this Point III to be without merit.

A. The Contention That There Can be No Successful Plan of Arrangement Without the Properties Which Are the Subject of Their Appeals.

The Receiver argues that if the decision of the Bankruptcy Judge is allowed to stand and possession of the Premises involved upon these appeals is returned to the landlord plaintiffs, no successful plan of arrangement would be possible. This is so, the Receiver contends, by reason of the supposed

* The briefs of the Receiver and the debtors were not served until after the original date set for argument of this appeal, August 27, 1974. In the absence of any briefing schedule upon this expedited appeal prior to the original date set for argument, the bulk of Points I and II of this brief was written before receipt of the briefs of the Receiver and the debtors, in the expectancy that the argument would take place and the case would be submitted for decision on the date originally scheduled therefor.

fact that "the leases * * * constitute the primary business, and in most instances, the sole remaining asset of the Debtors" and that termination of the leases here "is the equivalent of an adjudication in bankruptcy". See Receiver's Brief, pp. 3, 22. As has already been demonstrated in Point I of this brief, such consideration, even if factually sound, would be insufficient under the totality of the circumstances presented here to warrant denial of enforcement of termination provisions of the leases. In any event, the Receiver can point to no evidence in the record which supports his contention.

In fact, the debtors' brief (p. 13) indicates that about 50 properties of the 200 or more warehouses in the possession of the debtors on the date of the Chapter XI petition herein are still left. Such figure is confirmed by a report recently filed with the Bankruptcy Judge showing some 51 properties still in possession of the Receiver. Thus, the 20 or so properties involved in these appeals do not constitute even half of the debtors' properties. Indeed, at a hearing held in August of this year before the Bankruptcy Judge with respect to the stay order, the Receiver's attorneys indicated that the properties in issue comprised about 2,000,000 square feet of the 7,000,000 square feet, or about 30%, of the warehouse space still in the possession of the Receiver.

There is nothing in the record to indicate that after possession of the premises in issue is restored to the landlord plaintiffs, a plan of arrangement cannot be proposed for an enterprise, albeit on a reduced scale, consisting of the remaining properties.

B. The Alleged Prejudice to "Other Creditors"

The Receiver asserts as one of the criteria which should be considered in determining whether the termination of the leases should be upset here, the alleged fact that termination would result in an undue advantage to the landlords in the present cases at the expense of other general creditors of the debtors. See Receiver's Brief, pp. 21, 22-23. This argument is legally incorrect and factually misleading. In the first place, it is incorrect to measure the effect of the exercise of the landlords' contractual rights of termination against the rights of creditors generally. The landlords' contractual termination rights exist independent of their rights as creditors. Insofar as the rights of the landlords as creditors of the debtors are concerned, there is nothing to indicate that the landlords will receive any greater percentage on their claims than any other creditors of the same class. That the landlords are the beneficiaries of bargained

for enforceable contractual provisions for their protection which will have the effect of preventing further losses and restoring their property to them should not properly be a matter for complaint by the Receiver, the debtor or unsecured creditors. Although not on all fours, a helpful analogy is the situation of the secured creditor, who by virtue of realization on his security pursuant to contractual provisions, winds up being made whole while unsecured creditors receive less than 100% of their claims and the debtor loses the property which was the subject of the security interest. In such instance, no one would seriously think of contending that the court should impede the secured creditors because of the less favorable result to unsecured creditors. By parity of reasoning, it is fallacious to argue, as the Receiver does, that the exercise of the landlord plaintiffs' termination rights should be thwarted because it would supposedly result in an advantage to them over other creditors.

Quite apart from the fallacious nature of the Receiver's legal argument, the Receiver's great solicitude for "other creditors" is misleading as well. The claims of whatever creditors there are other than landlords in these proceedings are minor. As the Bankruptcy Judge recognized in his Opinion (p. 9), "the landlord-purchasers represent the largest of the

creditors, by far, with whom the debtor hopes to deal in these arrangement proceedings." Many of such landlords, other than those involved in these appeals, also terminated their leases and have already received their properties back. See Receiver's Brief, p. 7; Debtors' Brief, p. 13. There is no valid reason why the landlords against whom the Receiver and the debtors have chosen to fight and thereby delay should be left without their properties and in a worse position than the landlords who received their properties back. Such would be the result however, if termination is refused. Thus, the supposed prejudice to "other creditors" by reason of termination is not a valid consideration here.*

C. The Tampa #3 Decision --
Absence of Rent Arrears
or Other Pre-Petition Defaults.

The Receiver argues that the Bankruptcy Judge made a decision inconsistent with the present cases when he refused to enforce a termination of the Tampa #3 lease, and that the reasoning and conclusion of the Bankruptcy Judge in Tampa #3 should be equally applicable to the present cases. See Receiver's Brief, pp. 30-40. The Receiver admits that Tampa #3

* The Receiver's reference at page 23 of his brief to the supposed prejudice to "a bank which has advanced several hundred thousand dollars to the Receiver" is also misleading. That bank is a secured creditor, secured by Receiver's certificates and an assignment of the debtors' receivables.

is factually distinguishable in that, unlike the present cases, there were no rent defaults or other pre-petition defaults, but argues that these defaults should be disregarded as immaterial. See Receiver's Brief, pp. 33-40. This argument is without merit.

In the first place, the Tampa #3 decision should be considered in the context in which it arose, namely, that the landlord therein did not seek to terminate the lease until six months had gone by from the date of the filing of the petition upon which such termination was based. Thus, the elements of waiver and estoppel were present, although the Bankruptcy Judge did not ostensibly base his decision thereon. Next, it is not clear from the decision in Tampa #3 precisely what the Bankruptcy Judge was holding and precisely what the grounds for such decision were. Thus, in response to an inquiry from counsel to the landlord, the Bankruptcy Judge agreed with counsel's statement that:

he [the Bankruptcy Judge] is not making any determination of the issue as to whether or not the lease is terminated on the basis of the default provision in the lease, but is only determining that the landlord's request for the premises is denied on the basis of Lane Foods.

Transcript of Tampa #3 Oral Opinion,
p. 53, annexed to Receiver's Brief.

However, the decision in In re Lane Foods, Inc., 213 F.Supp. 133, 136 (S.D.N.Y. 1963) referred to in the Tampa #3 case "stands for no more than the proposition that upon termination of a lease the referee may order that the debtor temporarily retain possession pending confirmation of the arrangement in order to avert the radical dislocation that would otherwise result from a forced eviction from the premises." Schokbeton Industries, Inc. v. Schokbeton Products Corp., 466 F.2d 171 at 176 (5th Cir. 1972) (emphasis in original). Yet earlier in the Tampa #3 decision, the Bankruptcy Judge, contrary to his unqualified view expressed at page 53 of the transcript, stated that he did not adopt that part of Lane Foods which held that the stay therein would at some point be terminated and stated further that he did "not find that the lease has in any respect been terminated." Tampa #3 Opinion, pp. 47-48.

As noted, the Tampa #3 decision is concededly distinguishable from the present cases in that, unlike the present cases, there were no rent defaults or other pre-petition defaults and evidently no finding of a pattern of defaults and inequitable conduct on the part of the debtor. Thus, unlike the present cases, the Bankruptcy Judge might well have been justified "on the very limited and narrow facts presented" in Tampa #3 (Tampa #3 Opinion, p. 50) in refusing to recognize termination. In any event, that case is presently on appeal and may well be reversed.

The Receiver's attempt to disregard the rental arrears in the instant cases in order to achieve a result similar to the Tampa #3 decision must fail. Thus, the Receiver's argument ignores all of the other pre-petition defaults by the debtors in the instant cases, such as failure to make needed repairs, failure to pay taxes, failure to furnish required documents, constant late payments and the reluctance of the landlords to have any more dealings with the debtors and their management. Even assuming, arguendo, that the existence of pre-petition rental defaults was the only distinction between the Tampa #3 case and the instant cases, such distinction would be more than sufficient to justify a contrary decision in the instant cases. Thus, one of the grounds urged by the Receiver (Brief, p. 34) for ignoring the rental defaults is that the proposed plan of arrangement provides for payment in full of all pre-petition arrears at or before confirmation. It is readily apparent that such proposed payment amounts to no more than an unenforceable hope at this time to pay the arrears sometime in the future, if and when the debtors are able to raise the enormous amounts of money necessary to finance the plan, if and when the plan is accepted by creditors and if and when the plan is confirmed by the Bankruptcy Court. Nothing in the record indicates the existence of any tangible prospects for the acceptance, confirmation and effectuation of such a

plan in the near future. If such proposed plan is the basis for a reversal of the Bankruptcy Judge's decision, the landlord plaintiffs, who have already been delayed more than nine months at considerable inconvenience and expense, will be delayed even longer to await the results of what at present can be described as only a dim possibility of a plan providing for full payment of arrears. The Bankruptcy Judge's finding that any such plan does not appear to be feasible (Opinion, pp. 27-28) is amply justified in view, among other things, of the admitted approximately \$1,000,000 in pre-petition arrears on the properties (see Debtors' Brief, p. 41) and the inability, despite the claimed profitability of the properties, of the Receiver to make timely use and occupation payments to the landlord plaintiffs during these Chapter XI proceedings. Indeed, the four to six week lag in such payments noted by the Bankruptcy Judge in his Opinion (p. 14) is now in excess of eight weeks. Thus, at the time this brief was being written, use and occupation payments for July of 1974 had not been made. And, the Receiver's attorneys have admitted to this Court that use and occupation payments for a particular month can be paid only by resort of rental payments collected in subsequent months.

The Receiver and the debtors also seek to excuse the tender of the defaulted pre-petition rent by claiming that any

such payment would violate the Sections 337(2) and 367(3) of the Bankruptcy Act and orders of the Bankruptcy Judge. (See Receiver's Brief, pp. 30-31, 34; Debtor's Brief, p. 44.) An examination of the statutes and orders cited reveals no such prohibition. Moreover, this assertion is belied by the fact that in these very proceedings, pre-petition arrears have been and are being paid as part of a settlement with one of the landlords whereby as a condition to reinstatement of the lease in question such payments are being made in addition to a new rental. And, it should be noted that the prohibitions relied upon by the Receiver and debtors did not prevent the debtor in the Queens Boulevard case from making a tender of the pre-petition rents.

The many and varied excuses asserted by the Receiver and debtors cannot mask the fact that they are presently unable to pay the rental arrears and have no reasonable prospect of being able to do so in the near future. And, quite apart from their inability to finance their supposed plan, the debtors have been unable to obtain anywhere near the requisite creditor acceptances, despite the fact that the plan has been outstanding since early 1974. Thus, any reliance upon such plan is wholly misplaced.

D. The Alleged Failure of the Bankruptcy Judge to Make Special Findings of Fact.

The Receiver contends that these cases should be remanded by reason of the fact that the Bankruptcy Judge allegedly failed to "find the facts specially and state separately * * * [his] conclusions of law thereon" with respect to each of the cases tried below, in contravention of Bankruptcy Rule 752. (See Receiver's Brief, pp. 49-52.) Such contention is unfounded.

Bankruptcy Rule 752 is admittedly adapted from Rule 52 of the Federal Rules of Civil Procedure. (See Receiver's Brief, p. 49.) The cases under Rule 52 provide a complete refutation of the Receiver's argument. Thus, the law is clear that

[t]he purpose of Rule 52(a) is satisfied if the trial court's findings are sufficient to afford a clear understanding of the ground upon which the court based its judgment.

Fluor Corp. v. United States,
ex rel Mosher Steel Co., 405
F. 2d 823, 828 (9th Cir. 1969).

See also Seligson v. Roth, 402 F.2d 883, 887 (9th Cir. 1968). All that is required is the "evidentiary basis" for the

decision on the issues presented. United States v. F. D. Rich Co., 439 F.2d 895, 898 (8th Cir. 1971). The opinion of the Bankruptcy Judge more than satisfies these tests. Thus, the Bankruptcy Judge specifically listed the various equities and criteria mentioned in the cases in which termination was refused and specifically found that not enough of such factors existed in any of the present cases to justify the application of his discretionary equitable powers to refuse to give effect to the terminations here. See Opinion, pp. 26-28. Thus, it is quite evident from the Bankruptcy Judge's opinion what the grounds of his decision were. Nothing more was required.

Moreover, the Receiver and the debtors received the benefit of the Bankruptcy Judge's general conclusion that all of the sublease operations involved in these disputes "yield a substantial profit", when many of these properties were actually marginal or loss operations. This is borne out by the Receiver's failure to prosecute his appeal on one-third (8 out of 24) of the leases at issue. See Receiver's Brief, p. 8. Furthermore, it ill behooves appellants to complain of lack of specificity of the findings as to each of the leases in question, when nowhere in their briefs or in the record is there any proof as to the financial or operational status of each of the debtors as a separate entity. And, throughout

the trials, appellants had no hesitancy about treating the various debtors as one entity. Thus, for example, on the issue of maintenance expense, the appellants were successful in pressing for a finding of an annual expense of 2 cents per square foot (\$200 per month per 120,000 square foot warehouse) based upon the national average for the Overmyer organization, despite the admitted fact that maintenance expenses varied from property to property.

E. The Debtors' Claim That Section 70b is Inapplicable to Chapter XI.

The debtors go to great lengths in their brief (pp. 25-37) to attempt to support their contention that Section 70b of the Bankruptcy Act is not applicable to Chapter XI. Unfortunately, this contention is contrary to all the reported cases and the leading authorities. Thus, as set forth in 8 Collier, Bankruptcy ¶ 3.15 [3] n. 14 (14 ed. 1971):

§ 70b provides in part that "an express covenant that an assignment by operation of law or the bankruptcy of a specified party thereto or of either party shall terminate the lease or give the other party an election to terminate the same shall be enforceable." That provision is applicable in a Chapter XI proceeding.
(Emphasis supplied.)

See, e.g., In re Speare, 360 F.2d 882 (2d Cir. 1966); Urban Properties Corp. v. Benson, Inc., 116 F.2d 321 (9th Cir. 1940). And, of course, the Queens Boulevard case itself, a Chapter XI proceeding, expressly states that Section 70b is "made applicable here by Section 302 of the Act."

F. There Is No Evidence as to the Existence Or the Amount of Any "Windfall" to the Landlord Plaintiffs as the Result of the Lease Terminations.

Throughout their briefs, both the Receiver and the debtors claim that the landlord plaintiffs will receive a "windfall" if the lease terminations are permitted to stand. This conclusion follows, they claim, from the fact that certain of the leases presently throw off a profit to the Receiver, which profit will be appropriated by the landlords upon ouster of the Receiver and debtors from possession. See, e.g., Receiver's Brief, pp. 3, 21. In the first place, there is no assurance that because a lease may be profitable to Overmyer, it will be profitable to the particular landlord plaintiff involved. Moreover, quite apart from the fact that the only alternative to any such supposed "windfall" is the continuation of Overmyer as a tenant and the likelihood of continued defaults, inconvenience, expense and foreclosure threats, there is no evidence in the record as to what the extent of

any such supposed "windfall" is in any case. The debtors attempt to supply such deficiency by annexing a schedule to their brief showing a figure for "Projected Gross Profit Over Life Of Lease and Renewal Option". However, no such figures appear in the record and indeed, in an early trial involving a landlord represented by the Henry & Brecker firm, an attempt by the appellants to establish such projected value through supposed expert testimony was rejected by the Bankruptcy Judge as speculative and hearsay. In the later trials, including the trials involving the landlords represented by the undersigned, appellants did not even attempt to establish such value. Moreover, in view of the vicissitudes of the economy and the real estate market, there is no assurance that a lease which is profitable today will be profitable 5, 10 or 20 years from now. Thus, any considerations of possible "windfalls" to the landlord plaintiffs are purely speculative and unsupported by the record.

G. The Allocation of Expenses of the Debtors' Operations.

The debtors now argue (Debtors' Brief, p. 12) that "[t]he Court in determining the debtors' equity in the properties should have viewed direct income and expenses on a building by building basis rather than plugging in an overall

estimated cost to the debtors per building, which included expense overhead of a New York operation". The simple answer to this contention is that the debtors participated in the April 18, 1974 evidentiary hearing at which such estimated cost (\$20,000 per 120,000 square foot building per annum) was arrived at and never objected to the procedure used, which in fact was agreed to by all interested parties. See Transcript of April 18, 1974. Moreover, it is self-evident that the costs of running the central New York office are a proper consideration in determining profitability on the various properties. Otherwise, certain administrative expenses with respect to the various properties would simply be lost in a general overall financial statement and no true picture of profitability of the various properties could be obtained.

Moreover, the \$20,000 figure was an approximation made by the Court after lengthy testimony so as to avoid even more lengthy and protracted cross-examination of the witnesses for the Receiver on each item properly considered to be an expense of the operation of the properties. In fact, the record shows that the \$20,000 figure was a "light" approximation agreed to by all parties present, and did not include significant expense items such as brokerage commissions

incurred in connection with the constant short-term subletting, which is the essence of the debtors' business, or a reserve for vacancies. See, e.g., Transcript of April 18, 1974, pp. 86-89. Had testimony been given as to these expense items, the \$20,000 figure would surely have been much greater.

H. The Myth of Overmyer as a Viable Enterprise.

The Debtors' Brief (p. i) attempts to convey the impression that the Overmyer operation was basically a sound one which ran into cash flow difficulties in 1973 as the result of extrinsic economic forces prevalent in the nation's economy. The picture sought to be painted by the debtors has no support in the record. Indeed, if any conclusions can be drawn from the evidence adduced at trial with respect to the various leaseholds and Overmyer's dealings with the various landlords, it must be concluded that the Overmyer operation was unprofitable from the outset and continued to be unprofitable until the commencement of these proceedings and thereafter. Thus, as demonstrated above, Overmyer was constantly late in the payment of rent, taxes and in fulfilling its other obligations, had evidently operated on the principle of "delay-default-cure if necessary" so as to juggle its available cash, and where necessary, had litigated wherever

such litigation would further delay meeting its obligations.

See, e.g., D. H. Overmyer Co. v. Frick Co., 405 U.S. 174 (1972). Using these tactics, Overmyer was able until late last year to remain one step ahead of massive lease terminations and foreclosures. It is submitted that the history of the Overmyer operation is relevant to a court of equity in its determination as to whether to invoke "high equity" to prevent lease terminations.

I. The Bankruptcy Judge's Supposed "Prejudgment" of These Cases.

The debtors make the desperate contention in their brief (pp. 3, 39-41) that the Bankruptcy Judge prejudged these cases by his statements prior to trials herein. Such claim is belied not only by the careful and well-reasoned Opinion of the Bankruptcy Judge, but also by the fact that the Bankruptcy Judge would have been justified in adjudicating the debtors bankrupts on a variety of grounds unrelated to these actions, but did not do so despite repeated demands for adjudication from the creditors. Indeed, the history of these proceedings shows that the Bankruptcy Judge leaned over backwards not to adjudicate and to thereby give the debtors and the Receiver a full opportunity to litigate these actions on the merits. Thus, for example, the Bankruptcy Judge could have adjudicated

the debtors bankrupts pursuant to Section 376 of the Act for failure to file acceptances to the proposed plan of arrangement. Instead, the Bankruptcy Judge continued to adjourn the time for filing such acceptances. Similarly, the Bankruptcy Judge could have ordered the debtors to post indemnity pursuant to Section 326 of the Act and Rule XI-4 of the Bankruptcy Rules of this Court and then adjudicated the debtors bankrupts pursuant to Section 327 upon their likely failure to comply with such an order. Instead, the Bankruptcy Judge has continued to adjourn the Rule XI-4 indemnity hearing. And, significantly, despite the fact that the payment of use and occupation has been from 4 to 6 weeks late and now is over 8 weeks late, the Bankruptcy Judge has steadfastly refused to adjudicate. Such conduct can hardly be deemed a "pre-disposition" against the debtors.

Summary

No compelling equitable or policy reasons exist for refusal to give effect to plaintiffs' termination of the Lease. The findings of fact made by the Bankruptcy Judge were not clearly erroneous and his decision not to refuse enforcement of the termination was not an abuse of discretion. None of the arguments raised in appellants' brief has any merit.

Plaintiffs have properly terminated the Lease and are entitled to immediate possession of the Premises.

Conclusion

The order and judgment of the Bankruptcy Judge must be affirmed in all respects.

Respectfully submitted,

WACHTELL, LIPTON, ROSEN & KATZ
Attorneys for Plaintiffs-Respondents
299 Park Avenue
New York, New York 10017
Tel. No. (212) 371-9200

Theodore Gewertz
Allen P. Rosiny
Of Counsel.

APPENDIX

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

WOLK97

-----X
In the Matter

-of-

In Proceedings For
An Arrangement

D. H. OVERMYER CO., INC. (Massachusetts),
Debtor.

Nos. 73 B 1143 and
73 B 1129

GEORGE SAGAN and HAROLD KAPLAN,

ORDER AND JUDGMENT

Plaintiffs,

-against-

D. H. OVERMYER CO., INC. (Incorporated
under the laws of Massachusetts), Debtor,
ROBERT HERZOG, Receiver for D. H.
OVERMYER CO., INC. (Incorporated under
the laws of Massachusetts), Debtor,
D. H. OVERMYER CO., INC. (Ohio), Debtor,
and ROBERT HERZOG, Receiver for D. H.
OVERMYER CO., INC. (Ohio) (Incorporated
under the laws of Ohio),

Defendants.

-----X

Plaintiffs George Sagan and Harold Kaplan ("Landlord")
having commenced this adversary proceeding against the Debtors
and the Receiver seeking to compel the return of possession to
the Landlord of certain warehouse premises known as Boston No.
6 and 7 and located at 15 New York Avenue in the Town of Framing-
ham, County of Middlesex, Commonwealth of Massachusetts (the
"Premises") and the same having duly come on to be heard before
me on January 14, January 23 and April 18, 1974;

NOW, upon the complaint and the answers of Robert P.
Herzog, the Receiver of Debtors ("Receiver") and Debtor D. H.
Overmyer Co., Inc. (Massachusetts), and after hearing Wachtell,

Lipton, Rosen & Katz, attorneys for Landlord, by Theodore Gewertz, Esq., of counsel, in support thereof, and Booth, Lipton & Lipton, attorneys for Receiver, by Edgar H. Booth, Will B. Sandler and Michael R. Kleinerman, Esqs., of counsel, and Levy, Levy & Ruback, attorneys for Debtors, by Gary L. Blum and Burton R. Lifland, Esqs., of counsel, in opposition, and upon the record taken at the trial of this action before this Court on January 14, January 23 and April 18, 1974; and due deliberation having been had, the Court having filed its Opinion; it is

ORDERED that judgment be and the same hereby is granted in favor of Landlord and against the Receiver and the Debtor to the extent hereinafter provided, and the Lease between the Landlord and the Debtor with respect to the Premises is hereby terminated effective as of ^{December 15, 1973} ~~July 31, 1974~~; and it is further

ORDERED that the Receiver and the Debtor be and hereby are directed to surrender possession of the Premises to Landlord effective as of July 31, 1974; and it is further

ORDERED that Landlord may apply upon notice to the Receiver and Debtor for such further and appropriate relief as may be consistent with the Landlord's application and the Court's Opinion; and it is further

~~ORDERED that the execution of and any proceedings to enforce the foregoing judgment and order be stayed pending the determination of the appeal therefrom by the Receiver and/or~~

Dated: New York, New York
August 6, 1974

s/ Gary Babitt
Bankruptcy Judge

FOR ID.
APPLICANT'S EX. 4 IN EFD.
11/14/74 B.W.R.

D. H. OVERMYER CO., INC.
P.O. BOX 1747, GRAND CENTRAL STATION
NEW YORK, N. Y. 10017

VOUCHER NO.

539

Fanning 110

AY TO THE ORDER OF
George Sagan & Harold Kaplan

DATE

11/7/73

PAY

\$ 23,771.00

AMOUNT
\$23,771.00

PROCESSED
The First National Bank of Boston

NOV 7 1973

1ST NATIONAL BANK
OF BOSTON
BOSTON, MASS.

John. Kirby
George L. Lewis

029955

CHECK NO.

00029955#

00110#0039#

526#1722#

0002377100#



"From Saving

Comes Having

APPLICANT'S EX-5 IN EFD.
1/14/74 B.W.R.

FORM ID.

The Provident Institution for Savings
in the Town of Boston • 36 Temple Place • 02105
Telephone (617) 423-9600

February 11, 1972

Messrs. George Sagan and
Harold Kaplan
51 Upper Montclair Plaza
Upper Montclair, New Jersey 07043

Gentlemen:

Re: Purchase by George Sagan and Harold Kaplan of D. H. Overmyer Co., Inc. property, New York Avenue, Framingham, Massachusetts

On July 11, 1968 you purchased the above premises from D. H. Overmyer Co., Inc. subject to a mortgage held by the Bank dated December 12, 1967, recorded with Middlesex South District Registry of Deeds in Book 11441, Page 685 and with Worcester District Registry of Deeds in Book 4817, Page 374.

The mortgage provided for the collection monthly of a sum equal to one-twelfth of the estimated real estate tax due the Town of Framingham on October 31 of each year. In the commitment for mortgage originally issued to D. L. Cowell of the D. H. Overmyer Warehouse Company in New York by letter dated April 27, 1966, as amended by letter dated May 5, 1966, the Bank agreed to permit the mortgagor to pay such taxes directly reserving to the Bank the right to collect the taxes as in the mortgage provided "if at any time the tax payment is in arrears." On July 12, 1968, the Bank made the same agreement with you as the new owners.

Because of the problem encountered last year in getting the 1970 real estate taxes paid, and the present delinquent status of the 1971 real estate taxes, we are hereby withdrawing the above tax privilege and establishing a monthly accrual for taxes. This accrual will be reflected with the March bill and will be based on one-eighth (March - October) of the total 1971 annual bill of \$72,751.50. The monthly tax accrual will be \$9,094.

You are also hereby notified that unless the delinquent 1971

Other Offices: 30 WINTER STREET • 120 FRANKLIN STREET • SUMMER-WASHINGTON SUBWAY
15 PRUDENTIAL CENTER PLAZA • 25 STATE STREET • 151 TREMONT STREET
CHARLES RIVER PLAZA SHOPPING CENTER • 43 KNEELAND STREET

The Provident Institution for Savings in the Town of Boston

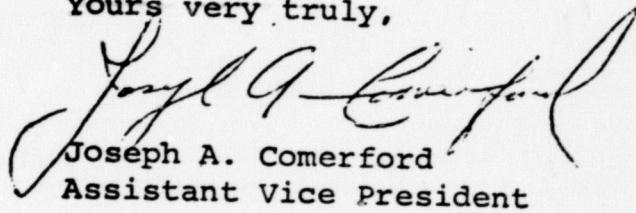
Messrs. Goerge Sagan and Harold Kaplan

February 11, 1972

Page 2

real estate tax bill plus interest and demand charges is paid in full and evidence of payment forwarded to us by February 21, 1972, we intend to call your loan and demand the full outstanding principal balance plus interest and fees.

Yours very truly,



Joseph A. Comerford
Assistant Vice President

JAC:gms
#4-10730-12
Certified Mail

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
(In Bankruptcy)

In the Matter

of

D. H. OVERMYER,

No. 73 B 1129

Debtor.

United States Court House
Foley Square, New York, N.Y.

January 23, 1974
3:30 o'clock p.m.

LANDLORD'S MOTION FOR POSSESSION - POKRASS -
WACHTELL, LIPTON, ROSEN & KATZ, ESQS.

Before:

HON. ROY BABITT, Referee In Bankruptcy

BARRY W. RAYVID
Official Court Reporter
U.S. Courthouse (R. 230)
Foley Square, New York, N.Y. 10007

1
2 APPEARANCES :3
4 WACHTELL, LIPTON, ROSEN & KATZ, ESQS.
5 Attorneys for the Applicant
6 299 Park Avenue
7 New York, New York

8 BY: THEODORE GEWERTZ, ESQ., Of Counsel

9
10 LEVY, LEVY & RUBACK, ESQS.
11 Attorneys for the Debtor
12 225 Broadway
13 New York, New York14 BY: GARY BLUM, ESQ., Of Counsel
15 -and-
16 BERTRAM R. LINDLAND, ESQ., Of Counsel17
18 ROBERT P. HERZOG, ESQ.
19 Receiver
20 185 Madison Avenue
21 New York, New York22
23 BOOTH, LIPTON & LIPTON, ESQS.
24 Attorneys for the Receiver
25 292 Madison Avenue
New York, New York26 BY: EDGAR H. BOOTH, ESQ., Of Counsel
27 -and-
28 WILL B. SANDLER, ESQ., Of Counsel
29 -and-
30 MICHAEL KLEINERMAN, ESQ., Of Counsel31
32 MR. DANIEL H. OVERMYER,
33 President of the Debtor

34 - - - - -

PROCEEDINGS

1
2
3
4 MR. GEWERTZ: As far as Mr. Flanagan
5 goes, and as I understand the proposed stip-
6 ulation, we would be willing to stipulate as
7 to the gross rentals provided.

8 However, we can do this on all of our
9 cases if the trustee would supply us with a
10 schedule just showing the - -

11 THE REFEREE: Contents of the sub-
12 leases?

13 MR. SANDLER: He wants to know who the
14 sub-tenants are.

15 THE REFEREE: You don't believe Mr.
16 Flanagan when his records show X dollars from
17 sub-tenants?

18 MR. GEWERTZ: I would like to know how
19 much footage is rented and when the leases
20 expire.

21 I think that is relevant if we have
22 leases that expire in three months.

23 THE REFEREE: That goes to value. Mr.
24 Flanagan's testimony, as I understand it, is
25 that in the main lease we pay out so much and

1
2 we get in so much. That's all he testified
3 to.

4 You want to know what the leases them-
5 selves say?

6 MR. GEWERTZ: What I want to know is
7 what the leases are.

8 THE REFEREE: How much is left. Is
9 there anything wrong with that?

10 MR. SANDLER: It's just a mechanical
11 problem.

12 MR. GEWERTZ: I would like to make a
13 back request as to my Ohio property.

14 MR. SANDLER: You are too late. It's
15 a mechanical problem.

16 THE REFEREE: I am not going to get to
17 this right away, either. In the next week
18 or ten days give him a list of his properties,
19 what the sub-leases there are, what they call
20 for, how much life remains.

21 MR. GEWERTZ: The only other thing, Your
22 Honor, is there was a Pokrass area of examina-
23 tion which I think we can defer to the session
24 where somebody is going to testify as to
25 allocations. That sort of goes to the

1 aggregate over-all picture.
2

3 THE REFEREE: Everybody has a right of
4 cross-examining Mr. Herzog or his accountant
5 when he gets figures on how much of the over-
6 all operations this company is allocated to
7 each of the buildings.

8 MR. GEWERTZ: I was prepared to go into
9 on cross-examination some aggregate questions
10 of the total amount of arrearages, the
11 aggregate of rental payments and taxes.

12 THE REFEREE: I wouldn't allow you to
13 do that.

14 MR. GEWERTZ: Then it may be proper for
15 first meeting purposes.

16 THE REFEREE: If I have time, I will
17 give you five minutes to examine at the first
18 meeting. I would not allow you to get an
19 over-all picture. I don't think we can give
20 it to you.

21 MR. GEWERTZ: It goes to the equity.
22 On the maintenance we have this two cents per
23 square foot figure and I am advised by one
24 of the attorneys for the debtor - -

25 MR. KLEINERMAN: I object. I was talking

1
2 off the record. I don't want a word of this
3 to go into the record. He was not advised
4 about anything.

5 THE REFEREE: If you have any questions
6 with Mr. Guy, we will put him on the stand
7 for you. His testimony is an invariable.

8 MR. GEWERTZ: I understand there is a
9 variation depending on locality.

10 MR. KLEINERMAN: He is going to get it
11 in.

12 THE REFEREE: First of all, you under-
13 stand this, we all know there are variations.
14 This is a general two-cent charge allocation
15 because there are places where they don't do
16 a dime in maintenance, where it is not spent.
17 For all you know, you may have one of them.

18 MR. GEWERTZ: We have shown two of them
19 - -

20 THE REFEREE: They have budgeted two
21 cents a square foot.

22 MR. GEWERTZ: I think the Court can
23 draw inferences from the fact there are
24 existing - -

25 THE REFEREE: That your problem in Ohio

is compounded by a lot of money?

MR. GEWERTZ: Yes, sir. This would also go to the average.

THE REFEREE: Mr. Guy already testified we run into some problems, big problems, immediate problems. But, it has worked out to a two-cent average, roughly.

MR. GEWERTZ: In one of my other properties, I have a large repair amount. We have testified as to that.

I would not be prepared to accept the two-cent figure for those properties.

THE REFEREE: Do you want to call him
and examine him on that?

MR. GEWERTZ: He is not my witness.

MR. SANDLER: Do you have a witness?

THE REFEREE: I am accepting his testimony as to what he just testified to, as to what he just said. If you want Mr. Guy to testify on cross-examination as to what the two cents compounds, fine.

(At this time a short recess was taken
and all parties subsequently returned.)

THE REFEREE: Do you want to finish

MR. GEWERTZ: Yes.

THE REFEREE: On Pokrass there were no charges that the building was in need of extensive repairs?

MR. GEWERTZ: I am willing to go along with the two-cent figure.

MR. SANDLER: Can we stipulate that the receiver presently earns seventy-six hundred dollars per month or approximately ninety thousand dollars per year from its operation of this property, prior to deducting insurance of one hundred fifty dollars per month, prior to deducting maintenance of two cents per square foot per annum, and prior to deducting office overhead which includes costs of sales?

THE REFEREE: For the Pokrass property?

MR. SANDLER: Yes. By "sales," I mean signing new leases. In the landlord's direct case there was testimony to the effect that eight hundred thousand dollars insurance was required to be maintained by the debtor, which is conceded.

There was testimony that only two hundred fifty thousand dollars was maintained.

However, the receiver has obtained from the records of the debtor a blanket policy of three million dollars which includes eight hundred thousand dollars allocated to this property, which is the required amount, and which policy was in affect through the date hereof and has now been replaced with the receiver's policy.

MR. GEWERTZ: What you have in your hand shows a two hundred fifty thousand dollar deductible whereas the lease requires only a five thousand dollar deductible. There is a big difference there of amount, especially since, I think, it's a well-known fact that the cost of the insurance is affected by the amount of the deductible.

When we have a variable such as this,
it's relevant.

MR. SANDLER: What had happened was this policy for eight hundred thousand dollars had a one hundred fifty thousand dollar deductible and it was based on - -

THE REFEREE: Do we have a problem?

MR. SANDLER: I don't think we have a

? problem.

3 MR. GEWERTZ: We do have a problem.

4 THE REFEREE: How many defaults do you
5 need?

6 MR. GEWERTZ: How much is it going to
7 cost to get a deductible - -

11 MR. GEWERTZ: In other words, he has a
12 different policy?

13 THE REFEREE: He is not bound by your
lease that says the cost - -

15 MR. GEWERTZ: Sooner or later he either
16 will be or won't be.

17 MR. SANDLER: I believe that we are
18 through with the stipulation on Pokrass.

22 THE REFEREE: I am telling you that's
23 what I have told him to cover these buildings
24 with and that's what it's costing him. I am
25 satisfied that's enough coverage within the

1
2 duties of the receivership, and it costs one
3 hundred fifty dollars.
4

5 MR. GEWERTZ: Fine.
6

7 THE REFEREE: Decision reserved.
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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----X
In Proceedings For
An Arrangement

Nos. 73 B 1143 and
73 B 1129

ORDER AND JUDGMENT

In the Matter

-of-

D. H. OVERMYER CO., INC. (Florida),

Debtor,

SAMUEL H. POKRASS and SYLVIA POKRASS,

Plaintiffs,

-against-

D. H. OVERMYER CO., INC. (Incorporated
under the laws of Florida), Debtor,
ROBERT HERZOG, Receiver for D. H.
OVERMYER CO., INC. (Incorporated under
the laws of Florida) Debtor,
D. H. OVERMYER CO., INC. (Ohio) (Incor-
porated under the laws of Ohio), Debtor,
and ROBERT HERZOG, Receiver for D. H.
OVERMYER CO., INC. (Ohio) (Incorporated
under the laws of Ohio),

Defendants.

-----X

Plaintiffs Samuel H. Pokrass and Sylvia Pokrass
("Landlord") having commenced this adversary proceeding against
the Debtors and the Receiver seeking to compel the return of
possession to the Landlord of certain warehouse premises known
as Miami No. 2 and located at 3400 and 3500 Northwest 110th
Street, City of Miami, County of Dade, State of Florida (the
"Premises") and the same having duly come on to be heard before
me on January 14, January 23 and April 18, 1974;

NOW, upon the complaint and the answers of Robert P.
Herzog, the Receiver of Debtors ("Receiver") and Debtor D. H.
Overmyer Co., Inc. (Florida), and after hearing Wachtell, Lipton,

Rosen & Katz, attorneys for Landlord, by Theodore Gewertz, Esq., of counsel, in support, and Booth, Lipton & Lipton, attorneys for Receiver, by Edgar H. Booth, Will B. Sandler and Michael R. Kleinerman, Esqs., of counsel, and Levy, Levy & Ruback, attorneys for Debtors, by Gary L. Blum and Burton R. Lifland, Esqs., of counsel, in opposition, and upon the record taken at the trial of this action on January 14, January 23 and April 18, 1974; and due deliberation having been had, and the Court having filed its Opinion dated July 23, 1974, it is

ORDERED that judgment be and the same hereby is granted in favor of Landlord and against the Receiver and the Debtor to the extent hereinafter provided, and the Lease between the Landlord and the Debtor with respect to the Premises is hereby terminated effective as of ~~July 31~~ ^{January 14}, 1974; and it is further

ORDERED that the Receiver and the Debtor be and hereby are directed to surrender possession of the Premises to Landlord effective as of July 31, 1974; and it is further

ORDERED that Landlord may apply upon notice to the Receiver and Debtor for such further and appropriate relief as may be consistent with the Landlord's application and the Court's Opinion; and it is further

~~ORDERED that the execution of and any proceedings to enforce the foregoing judgment and order be stayed pending the determination of the appeal therefrom by the Receiver and/or~~

Dated: New York, New York
August 6, 1974

Ray Bahrt
Bankruptcy Judge

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----x
In the Matter

of

73 B 1129
73 B 1134

D. H. OVERMYER CO., INC.,

Debtor.

STIPULATION

-----x
IT IS HEREBY STIPULATED, by and between WACHTELL, LIPTON, ROSEN & KATZ, attorneys for Samuel H. Pokrass and Sylvia Pockrass, plaintiffs; BOOTH, LIPTON & LIPTON, attorneys for Robert P. Herzog, Receiver, and LEVY, LEVY & RUBACK, attorneys for D. H. OVERMYER CO., INC. (the "Debtor"), that the testimony of Samuel Flannagan, an employee of the Receiver in charge of sales, marketing and collection of rents from subtenants in warehouses under lease to the Debtor, would be as follows:

1. There are presently five subtenants of the Debtor and Receiver in the warehouse known as Miami No. 2. The name and monthly rental of each subtenant is as follows:

DIABOLD	\$ 1,500.00
MODEL AGE FURNITURE	2,583.34
EAGLE FAMILY DISCOUNT	5,000.00
RIFSCO	4,500.00
COASTAL WIRE HARDWARE	<u>1,053.88</u>
	\$14,637.22

2. The gross profit realized by the Debtor and Receiver from Miami No. 2 is \$7,363.00 per month. This

sum is arrived at by deducting rent (\$5,969.00) and taxes (\$1,305.00) which items aggregate \$7,274.00 per month, from gross income of \$14,637.00 per month. (Pennies dropped.)

Dated: New York, N. Y.
January 23, 1974

WACHTELL, LIPTON, ROSEN & KATZ

By: Frederick F. West

BOOTH, LIPTON & LIPTON

By: for Will B. Sandler

LEVY, LEVY & RUBACK

By: for Burton Lifland

116.01-94

Miami, Florida

7-16

122

Received from S. H. Pokrass

Seventeen thousand Seven hundred eighty 96/100 DOLLARS

E 760' of W 1160.01' Tr. 3

Seaboard Industrial Park Sec 1A

~~RICHARD P. BRINLEY~~ Clerk Circuit Court

15 day hold By J. Broadbent

\$ 17,780.96

DADE COUNTY TAX COLLECTOR B.R. 19.
APPLICANT'S EX 5 IN EFD

Deputy Clerk.

11/15/72 B.W.R.



APPLICANT'S EX. 6 IN EFD.
11/5/74 B.W.R.

Arkwright-Boston Insurance

6 East 43rd Street.
New York, New York 10017/Tel: (212) 986-7470

CERTIFICATE OF INSURANCE

This certifies that this Company insures the property listed below in accordance with the terms and conditions of the Standard Fire Policy of the State in which the property is located under a blanket contract. The Policy covers against loss by Fire, Lightning, Wind or Hail, Sprinkler Leakage, Explosion, Riot, Civil Commotion, Vandalism and Malicious Mischief, Civil Authority, Vehicles, Aircraft, Sonic Boom, Smoke, Molten Material and Limited Radioactive Contamination, all as defined and limited by the terms of the Policy.

<u>POLICY NO.</u>	<u>AMOUNT OF INSURANCE FOR PREMIUM PURPOSES</u>	<u>EFFECTIVE DATE</u>	<u>EXPIRATION DATE</u>
401805	\$800,000	June 1, 1969	September 1, 1972

INSURED: D. H. Overmyer Co., Inc., (an Ohio Corporation), its Subsidiaries and Related Companies as may now or be hereafter constituted.

LOCATION: Real Property on a replacement cost basis on premises situate at 3400-3500 N.W. 110th Street, Site No. 2, in MIAMI, FLORIDA.

This location also covers Sam Pokrass and Sylvia Pokrass, as named insured and new owner.

The following clause/s apply to the above location:

Loss, if any, shall be payable to Prudential Insurance Company of America, P.O. Box 2202, Jacksonville, Florida 32203, and Sam Pokrass and Sylvia Pokrass, 9102 W. Bay Harbor, Bay Harbor Island, Florida, as their interests may appear.

This Policy does not cover any property belonging to Tenants nor the Insured's legal liability therefor.

This Policy does not cover contractors' and/or subcontractors' portable tools and equipment nor portable tools and personal belongings of contractors' and/or subcontractors' employees.

A \$5,000 Deductible Clause applies to all perils excluding Wind or Hail.

A \$12,500 Deductible Clause applies to the perils of Wind or Hail.

This insurance applies in accordance with the terms and conditions of the statutory form of the State of New York and the attached Factory Mutual Form D-1.

As respects to this location it is understood and agreed that the original policy will not be materially altered, reduced in amount or cancelled within ten (10) days written notice to Prudential Insurance Company of America, P.O. Box 2202, Jacksonville, Florida 32203, and Sam Pokrass and Sylvia Pokrass, 9102 W. Bay Harbor, Bay Harbor Island, Florida.

Dated at New York, New York and signed this 1st day of June, 1969.

ARKWRIGHT-BOSTON MANUFACTURERS MUTUAL INSURANCE COMPANY

Assistant Secretary/Authorized Underwriter

SCHIFF TERHUNE
INCORPORATED

Worldwide Insurance Brokers Since 1906

125 MAIDEN LANE, NEW YORK 38 • WHITEHALL 4-3700

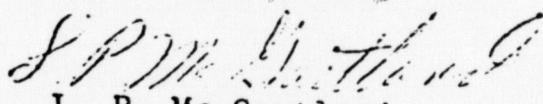
March 13, 1972

TO WHOM IT MAY CONCERN

Re: Birmingham Fire Insurance Company
Policy No. 1487566

The attached certificate cancels and replaces certificates previously issued on behalf of the Cotton Belt Insurance Company. Please note the term of this policy is March 1, 1972 to September 1, 1974.

Very truly yours,



L. P. Mc Gartland
Vice President

LPM:ak
ENC.

APPLICANT'S EX. 7 FOR ID.
1/15/74 IN EFD.
B.W.R.

CERTIFICATE OF INSURANCE

This certifies that this Company insures the property listed below in accordance with the terms and conditions of the Standard Fire Policy of the State in which the property is located under a blanket contract. The Policy covers against loss by Fire, Lightning, Wind or Hail, Sprinkler Leakage, Explosion, Riot, Civil Commotion, Vandalism and Malicious Mischief, Civil Authority, Vehicles, Aircraft, Sonic Boom, Smoke, Molten Material and Limited Radioactive Contamination, all as defined and limited by the terms of the Policy.

<u>AMOUNT OF INSURANCE</u>	<u>EFFECTIVE DATE</u>	<u>EXPIRATION DATE</u>
\$250,000.	March 1, 1972	September 1, 1974

INSURED: D. H. OVERMYER CO., INC., (AN OHIO CORPORATION), ITS SUBSIDIARIES AND RELATED COMPANIES AS MAY NOW OR BE HEREAFTER CONSTITUTED. and Sam Pokrass and Sylvia Pokrass, 9102 W. Bay Harbor, Bay Harbor Island, Florida

LOCATION: Real Property on a replacement cost basis on premises situated at 3400-3500 N.W. 110th Street, Miami, Florida

The following clause/s apply to the above location: Loss, if any, payable to The Prudential Insurance Company of America, P.O. Box 2202, Jacksonville, Florida 32203 as 1st Mortgagee and Sam Pokrass and Sylvia Pokrass, 9102 W. Bay Harbor, Bay Harbor Island, Florida and Assured A.I.M.A.

This Policy does not cover any property belonging to Tenants nor the Insured's legal liability therefor.

This Policy does not cover contractors' and/or subcontractors' portable tools and equipment nor portable tools and personal belongings of contractors' and/or subcontractors' employees.

A \$ 2,500.- Deductible Clause applies to all perils.

This insurance applies in accordance with the terms and conditions of the statutory form of the State of New York.

As respects to this location it is understood and agreed that the original policy will not be materially altered, reduced in amount or cancelled within ten (10) days written notice to Mortgagee and Assured shown in Loss Payable Clause.

COMPANY

Birmingham Fire Insurance Company 1487566

(Limit of Liability \$250,000.)

Dated at New York, New York and signed this 13th day of March, 1972. -J107-

POLICY
NUMBER

SIGNATURE

RECEIPT FOR CERTIFIED MAIL—30¢

No. 111249

SENT TO		POSTMARK OR DATE									
STREET AND NO.											
P.O., STATE, AND ZIP CODE											
<table border="1"> <tr> <td colspan="2">EXTRA SERVICES FOR ADDITIONAL FEES</td> </tr> <tr> <td>Shows to whom and date delivered</td> <td>Return Receipt Shows to whom, date, and where delivered</td> </tr> <tr> <td><input type="checkbox"/> 10¢ fee</td> <td><input type="checkbox"/> Addressee Only</td> </tr> <tr> <td><input type="checkbox"/> 35¢ fee</td> <td><input type="checkbox"/> 50¢ fee</td> </tr> </table>				EXTRA SERVICES FOR ADDITIONAL FEES		Shows to whom and date delivered	Return Receipt Shows to whom, date, and where delivered	<input type="checkbox"/> 10¢ fee	<input type="checkbox"/> Addressee Only	<input type="checkbox"/> 35¢ fee	<input type="checkbox"/> 50¢ fee
EXTRA SERVICES FOR ADDITIONAL FEES											
Shows to whom and date delivered	Return Receipt Shows to whom, date, and where delivered										
<input type="checkbox"/> 10¢ fee	<input type="checkbox"/> Addressee Only										
<input type="checkbox"/> 35¢ fee	<input type="checkbox"/> 50¢ fee										
<small>POD Form 3800 NO INSURANCE COVERAGE PROVIDED— (See other side)</small>											

12/23/71

D. H. Overmyer Co., Inc.
201 East 42nd Street
New York, New York, 10017

D. E. Overmyer Co., Inc. (Chicago)
201 East 42nd Street
New York, New York, 10017

Re: Overmyer Warehouse Miami #2
East 700 feet of West 1100 feet of
Tract 3, Section 1-A, Dade County,

Gentlemen:

For some time you have been receiving notices concerning interest on overdue payments on the lease on the subject property. Following is a tabulation of additional rent due computed, in accordance with Section 3.02 of the lease, at 3.5 per annum on overdue installments to date paid (date received), as shown below:

1968	January 9	\$ 7.95
	February 8	6.84
	March 15	13.82
	April 9	7.95
	May 8	6.84
	June 20	18.69
	July 10	8.95
	August 9	7.95
	September 23	21.88
	October 18	16.91
	November 26	24.68
	December 13	<u>11.00</u>
		\$ 155.07
1969	January 10	8.82
	February 14	22.54
	March 31	20.40
	April 26	24.50
	May 5	3.92
	June 3	1.06

APPLICANT'S EX. 12/23/71

FOR ID.
H. E. D.
G. W. R.

1969	July 1	\$ 0.00
	August 6	6.86
	September 5	3.82
	October 3	1.96
	November 6	4.00
	December 4	<u>2.94</u>
		\$ 111.72
1970	January 8	6.86
	February 10	8.82
	March 10	14.70
	April 17	15.68
	May 14	12.74
	June 12	10.78
	July 14	12.74
	August 17	15.68
	September 18	16.00
	October 6	3.92
	November 10	8.82
	December 23	<u>21.56</u>
		148.96
1971	January 20	18.62
	February 14	12.74
	March 10	8.82
	April 21	19.00
	May 24	22.54
	June 17	15.68
	July 3	7.84
	August 19	17.04
	September 28	26.40
	October 12	<u>10.78</u>
		160.72
	Attorneys' fees and expenses	<u>500.00</u>
	Total	\$1,076.47

Pursuant to instructions from our clients, we hereby make demand upon you for the total sum mentioned above. If we do not receive said sum forthwith, we will be forced to institute litigation to recover same.

Very truly yours,

Thomas R. Spencer, Jr.
For the Firm

TBS:lee
Copy: Mr. Samuel Peirass
Mr. Sol J. Peirass

SPACE FOR INDUSTRY
D. H. OVERMYER CO., INC.
201 EAST 42ND STREET • N.Y. N.Y. 10017 • 212 867-2170

EDMUND M. CONNERY
VICE PRESIDENT
SECRETARY AND GENERAL COUNSEL

April 3, 1973.

Mr. Thomas R. Spencer, Jr.
Myers, Kaplan, Porter, Levinson
& Kenin
Eleven Fifty Building
1150 Southwest 1st Street
Miami, Florida 33130.

Re: Samuel Pokrass and Sylvia Pokrass
vs. D.H. Overmyer Co., Inc. et al
Case No. 73-3346

Dear Mr. Spencer:

This letter is written in response to yours of March 30. On several occasions in the past I believe I have had the opportunity to speak to Mr. Pokrass. About the only thing we ever asked of Mr. Pokrass was that on different occasions and for different business reasons he grant us a minimum extension of time within which to pay the rent. These requests were sparse and the time involved was limited in duration.

Electing not to treat with us on what I consider to be an urgent business matter in a businesslike manner, your client elected to commence legal action against us in Florida. Under the circumstances I have recommended to Management they do not make any further payment of rent to Mr. Pokrass until such time as they are ordered to do so by the Court.

We are entering a defense to the action cited above and at that time I think your discontent along with ours will be fully aired before the Court.

I must correct a couple of misstatements in your letter, however.

We are not a publicly held company and, furthermore, some tardiness in industrial rents is not such an unusual situation that it should bring down the wrath of God upon our heads. We suffer substantially more delays in collecting some of our rents from some of our best customers

APPLICANT'S EX. 9
1/15/74 IN EFD.
B.W.R.

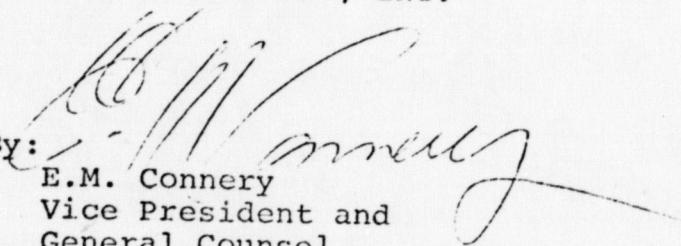
2.

April 3, 1973.

on very flimsy excuses than Mr. Pokrass has ever endured with us. Our position is not one of "total irresponsibility" or "fiscal irresponsibility". Your client elected to pursue this course and should not now be heard to complain if we answer the Complaint which you served upon us.

Very truly yours,

D. H. OVERMYER CO., INC.

By: 
E.M. Connery
Vice President and
General Counsel.

EMC:EKH
cc: Mr. Paul M. Stokes

RECEIVED APR 5 1973

-1111-

March 30, 1973

Paul M. Stokes, Esquire
Smathers and Thompson
1301 Alfred I. duPont Building
Miami, Florida 33130

Re: Samuel Pokrass and Sylvia Pokrass
vs. D. H. Overmyer Co., Inc., et al
Case No. 73-3346

Dear Mr. Stokes:

I have had the opportunity to speak with Mr. Pokrass in connection with the above captioned matter. He has still not received any payments in the last five months. In view of the status of the defendants as being publicly held companies, this is a rather unbelievable situation. Because of the actions of the defendants and their total irresponsibility, Mr. Pokrass will not accept a settlement of this case short of the surrender of the defendants together with the assignment of the subleases now in effect. The matter has dragged too long and has become much too personal a matter for Mr. Pokrass to accept the conditions which you outline.

No one is able to give us an assurance of timely payments and the continued financial procrastination of the defendants demonstrates nothing more than fiscal irresponsibility.

Should your clients be willing to surrender the premises without further litigation, we would be happy to entertain such discussions.

Sincerely yours,

THOMAS R. SPENCER, JR.
For the Firm

TRS:sls
Cert-BRR
cc: D. H. Overmyer Co., Inc. of
Florida
D. H. Overmyer Co., Inc.
Robert Sant'Angelo
bcc: Sol Pokrass
Samuel H. Pokrass

FORM ID:
APPLICANT'S EXP IN EFD
1/15/73 B.W.R.

No. 629140

RECEIPT FOR CERTIFIED MAIL—20¢ (plus postage)

SENT TO D.H. Overmyer Co. Inc.	POSTMARK OR DATE
STREET AND NO.	
P.O., STATE AND ZIP CODE	
OPTIONAL SERVICES FOR ADDITIONAL FEES	
RETURN	1. Shows to whom and date delivered 15¢
RECEIPT	With delivery to addressee only 65¢
SERVICES	2. Shows to whom, date and where delivered 35¢
With delivery to addressee only 85¢	
DELIVER TO ADDRESSEE ONLY 50¢	
SPECIAL DELIVERY (extra fee required)	

PS Form 3800 NO INSURANCE COVERAGE PROVIDED—
Nov. 1971 (See other side)
NOT FOR INTERNATIONAL MAIL

• GPO: 1970 0-387-496

No. 629141

RECEIPT FOR CERTIFIED MAIL—20¢ (plus postage)

SENT TO ROBERT SANT'ANGELO	POSTMARK OR DATE
STREET AND NO.	
P.O., STATE AND ZIP CODE	
OPTIONAL SERVICES FOR ADDITIONAL FEES	
RETURN	1. Shows to whom and date delivered 15¢
RECEIPT	With delivery to addressee only 65¢
SERVICES	2. Shows to whom, date and where delivered 35¢
With delivery to addressee only 85¢	
DELIVER TO ADDRESSEE ONLY 50¢	
SPECIAL DELIVERY (extra fee required)	

PS Form 3800 NO INSURANCE COVERAGE PROVIDED—
Nov. 1971 (See other side)
NOT FOR INTERNATIONAL MAIL

• GPO: 1970 0-387-496

No. 629138

RECEIPT FOR CERTIFIED MAIL—20¢ (plus postage)

SENT TO PAUL M. STOKES	POSTMARK OR DATE
STREET AND NO.	
P.O., STATE AND ZIP CODE	
OPTIONAL SERVICES FOR ADDITIONAL FEES	
RETURN	1. Shows to whom and date delivered 15¢
RECEIPT	With delivery to addressee only 65¢
SERVICES	2. Shows to whom, date and where delivered 35¢
With delivery to addressee only 85¢	
DELIVER TO ADDRESSEE ONLY 50¢	
SPECIAL DELIVERY (extra fee required)	

PS Form 3800 NO INSURANCE COVERAGE PROVIDED—
Nov. 1971 (See other side)
NOT FOR INTERNATIONAL MAIL

• GPO: 1970 0-387-496

No. 629139

RECEIPT FOR CERTIFIED MAIL—20¢ (plus postage)

SENT TO D.H. OVERMYER OFFLA.	POSTMARK OR DATE
STREET AND NO.	
P.O., STATE AND ZIP CODE	
OPTIONAL SERVICES FOR ADDITIONAL FEES	
RETURN	1. Shows to whom and date delivered 15¢
RECEIPT	With delivery to addressee only 65¢
SERVICES	2. Shows to whom, date and where delivered 35¢
With delivery to addressee only 85¢	
DELIVER TO ADDRESSEE ONLY 50¢	
SPECIAL DELIVERY (extra fee required)	

PS Form 3800 NO INSURANCE COVERAGE PROVIDED—
Nov. 1971 (See other side)
NOT FOR INTERNATIONAL MAIL

• GPO: 1970 0-387-496

3

SENDER: Be sure to follow instructions on other side

PLEASE FURNISH SERVICE(S) INDICATED BY CHECKED BLOCK(S)
(Additional charges required for these services)

Show to whom, date and address
where delivered Deliver ONLY
to addressee

RECEIPT
Received the numbered article described below

REGISTERED NO. SIGNATURE OR NAME OF ADDRESSEE (Must always be filled in)

CERTIFIED NO. *629140* SIGNATURE OF ADDRESSEE'S AGENT, IF ANY *John O.*

INSURED NO.

DATE DELIVERED *4-2* SHOW WHERE DELIVERED (Only if requested, and include ZIP Code)

SENDER: Be sure to follow instructions on other side

PLEASE FURNISH SERVICE(S) INDICATED BY CHECKED BLOCK(S)
(Additional charges required for these services)

Show to whom, date and address Deliver ONLY
where delivered to addressee

RECEIPT
Received the numbered article described below

REGISTERED NO. SIGNATURE OR NAME OF ADDRESSEE (Must always be filled in)

CERTIFIED NO. *629140* SIGNATURE OF ADDRESSEE'S AGENT, IF ANY *Orwings*

INSURED NO. *John O.*

DATE DELIVERED *4-2/73* SHOW WHERE DELIVERED (Only if requested, and include ZIP Code)

SENDER: Be sure to follow instructions on other side

PLEASE FURNISH SERVICE(S) INDICATED BY CHECKED BLOCK(S)
(Additional charges required for these services)

Show to whom, date and address Deliver ONLY
where delivered to addressee

RECEIPT
Received the numbered article described below

REGISTERED NO. SIGNATURE OR NAME OF ADDRESSEE (Must always be filled in)

CERTIFIED NO. *629139* SIGNATURE OF ADDRESSEE'S AGENT, IF ANY *Orwings*

INSURED NO. *John O.*

DATE DELIVERED *4/2/73* SHOW WHERE DELIVERED (Only if requested, and include ZIP Code)

SENDER: Be sure to follow instructions on other side

PLEASE FURNISH SERVICE(S) INDICATED BY CHECKED BLOCK(S)
(Additional charges required for these services)

Show to whom, date and address Deliver ONLY
where delivered to addressee

RECEIPT
Received the numbered article described below

REGISTERED NO. SIGNATURE OR NAME OF ADDRESSEE (Must always be filled in)

CERTIFIED NO. *629138* SIGNATURE OF ADDRESSEE'S AGENT, IF ANY *John O.*

INSURED NO. *John O.*

DATE DELIVERED *4-2-73* SHOW WHERE DELIVERED (Only if requested, and include ZIP Code)

John O. APR 3 1973

IN THE CIRCUIT COURT OF THE 11TH
JUDICIAL CIRCUIT IN AND FOR LAKE
COUNTY, FLORIDA

CASE NO. 73-0346

General Jurisdiction Division

SAMUEL H. POKRASS and
SYLVIA POKRASS, his wife,

Plaintiffs,

-vs-

ORDER

D. H. OVERMYER CO., INC. OF
FLORIDA, etc., et al.,

Defendants.

THIS CAUSE came on to be heard on the plaintiffs' motion for contempt on the grounds of the failure of the defendants to comply with the order of this Court dated June 7, 1973, in that no payments for the months of October and November have been made by the defendants as directed, and the Court having heard argument of counsel, finding that the October and November payments have not been made, and being otherwise advised in the premises, it is thereupon,

ORDERED AND ADJUDGED that the motion for contempt be and the same is hereby denied, but it is further

ORDERED AND ADJUDGED that if the payments for the months of October and November, 1973, as aforesaid, are not paid within 7 days of the entry of this order, that:

1. All of the rents, issues, and profits of any and all sublease agreements between the defendants and their sublessees received by the defendants on or after the date of the entry of this order be paid into the Registry of the Court, and, to this end,

2. That all checks representing rental payments received on or after the date of this order by the defendants from the aforesaid sublessees be endorsed by the defendants to the order of Richard P. Brinker, Clerk, for deposit into the Registry of the Court,

APPLICANT'S EX. 10 FOR ID.
1/15/74 B.W.R. IN EFD.

-J115-

and,

3. That upon the deposit of the funds as aforesaid, the plaintiffs may from time to time as payments under the lease agreement attached to the Amended Complaint become due, apply to this Court for an order permitting the plaintiffs to withdraw from the aforesaid Registry deposits sums in the amount of the payment then due.

DONE AND ORDERED at Miami, Dade County, Florida
this 25 day of November, 1973.

JUDGE
JACK M. TURNER

Circuit Judge

Copies furnished to:

Myers, Kaplan, Porter, Levinson & Kenin
Attorneys for Plaintiffs

Smathers & Thompson
Attorneys for Defendants.

STATE OF FLORIDA)
COUNTY OF DADE)
This Copy is a true Copy of the Original on file
in this Office, I witness my hand and Official Seal,
This 11 day of NOVEMBER A.D. 1973

RICHARD P. BRINKER
Clark Circuit Court

By

RICHARD P. BRINKER D.C.